	DATE	
24.	Feb. 2, 1970	Order granting 20 days to Petitioner to file reply to Supplement to Return filed by Respondent.
25.	Feb. 5, 1970	Supplement to Traverse.
26.	Mar. 25, 1970	Order to file copies in state possession.
27.	April 1, 1970	Order granting leave to file amendment & ordering Respondent to file response to matter raised by the Amendment.
28.	April 1, 1970	Amendment to Original Petition.
29.	April 10, 1970	Request Documents Concerning Petitioner's Parole Revocation and State Habeas Corpus Proceedings.
30.	April 9, 1970	Requested Documents Concerning Petitioner's Parole Revocation.
31.	April 15, 1970	Order Denying petition for Writ of Habeas Corpus.
32.	April 21, 1970	Notice of Appeal to Eighth Circuit Court of Appeals. (Treated as Application for a Certificate of Probable Cause).
33.	April 21, 1970	Order Denying application for a Certificate of Probable Cause.
34.	June 4, 1970	Copy of Order from CCA granting Application for Certificate of probable cause and directing Clerk to Docket Appeal.
35.	April 22, 1971	Judgment Mandate (attested copy from CCA). Affirming District Court's Judgment.
36.	April 22, 1971	Opinion from CCA (attested copy).

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
EASTERN DIVISION

JOHN J. MORRISSEY #29739 Full name and prison number (if any) of Petitioner vs. LOU V. BREWER (Warden) Name of Respondent	Case No. 2-468-E (To be supplied by the Clerk of the District Court)

[Filed, Sep 12 1969, *Clerk*, U.S. District Court Southern District of Iowa]

PETITION FOR WRIT OF HABEAS CORPUS
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA

PERSONS IN STATE CUSTODY

INSTRUCTIONS—READ CAREFULLY

In order for this petition to receive consideration by the District Court, it shall be in writing (legibly handwritten or typewritten), signed by the petitioner and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, petitioner may finish his answer to a particular question on the reverse side of the page or on an additional blank page. Petitioner shall make it clear to which question any such continued answer refers.

Since every petition for habeas corpus must be sworn to under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Petitioners should therefore exercise care to ascertain that all answers are true and correct.

If the petition is taken *in forma pauperis*, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that petitioner will be unable to pay the fees and costs of the habeas corpus proceedings. When the petition is completed, *the original and two copies* shall be mailed to the Clerk of the District Court for the Southern District of Iowa, at Des Moines, Iowa.

If petitioner desires to have a filed copy return to him, he shall request an additional set of forms and submit same with the original and required two copies.

1. Place of detention: Iowa State Prison, Ft. Madison, Ia.
2. Name and location of court which imposed sentence None.
3. The indictment number or numbers (if known) upon which and the offense or offenses for which sentence was imposed:
   (a) Parole Violation (Sect. 247.28) 1966 Ia. Code.
   (b) .....
   (c) .....
4. The date upon which sentence was imposed and the terms of the sentence:
   (a) on or about 2-15-69
   (b) .....
   (c) .....
5. Check whether a finding of guilty was made:
   There was no plea entered
   (a) after a plea of guilty .....
   (b) after a plea of not guilty .....
   (c) after a plea of nolo contendere .....
6. If you were found guilty after a plea of not guilty, check whether that finding was made by
   (a) a jury .....
   (b) a judge without a jury .....
7. Did you appeal from the judgment of conviction or the imposition of sentence? yes
8. If you answered "yes" to (7), list
   (a) the name of each court to which you appealed:
      i. Lee County District Court, Ft. Madison, Ia.
      ii. Iowa State Supreme Court, Des Moines, Iowa
      iii. .....

(b) the result in each such court to which you appealed:
i. Denied
ii. Denied
iii. .....
(c) the date of each such result:
i. 6-26-69
ii. 7-25-69
iii. .....
(d) if known, citations of any written opinion or orders entered pursuant to such results:
i. 388 F2d 91—267 F Supp. 433.
ii. 663.4-663.5 Iowa Code.
iii. .....

9. If you answered "no" to (7), state your reasons for not so appealing:
(a)
(b)
(c)

10. Prior to this Petition have you filed with respect to this conviction
(a) any petitions in State or Federal Courts for habeas corpus? yes
(b) any petitions in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? .....
(c) any other petitions, motions or applications in this or any other court? .....

11. If you answered "yes" to any part of (10), list with respect to each petition, motion or application
(a) the specific nature thereof:
i. I was arrested for a felony and denied due process
ii. .....
iii. .....
iv. .....
(b) the name and location of the court in which each was filed:
i. Lee County District Court, Ft. Madison, Ia.
ii. .....
iii. .....
iv. .....
(c) the disposition thereof:
i. Denied

ii. .....
iii. .....
iv. .....

(d) the date of each such disposition:
i. 6-26-69
ii. .....
iii. .....
iv. .....

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:
i. 388 F2d 91—267 F Supp. 433.
ii. .....
iii. .....
iv. .....

12. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
(a) I was arrested for a felony Sect. 247.28 Ia. Code and was denied due process.
(b) Was not brought before a Judge for a hearing
(c) No indictment found timely, charge not dismissed

13. State concisely and in the same order the facts which support each of the grounds set out in (12):
(a) 14th Amend. and 88 S. Ct. 1114
(b) Sect. 757.2, 1966 Ia. Code
(c) Sect. 795.1, 1966 Ia. Code.

14. Has any ground set forth in (12) been previously presented to this or any other court, state or federal, in any petition, motion or application which you have filed? yes

15. If you answered "yes" to (14), identify
(a) which grounds have been previously presented:
i. A, B, C, question #12
ii. .....
iii. .....

(b) the proceedings in which each ground was raised:
i. Habeas Corpus
ii. .....
iii. .....

16. If any ground set forth in (12) has not previously been presented to any court, state or federal, set forth

the ground and state concisely the reasons why such ground has not previously been presented:

(a)
(b)
(c)

17. Were you represented by an attorney at any time during the course of
    (a) your arraignment and plea? No
    (b) your trial, if any? No
    (c) your sentencing? No
    (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? Yes
    (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? No
18. If you answered "yes" to one or more parts of (17), list
    (a) the name and address of each attorney who represented you:
        i. Austin J. Roshid 619-7th Ave. Ft. Madison, Iowa.
        ii. .....
        iii. .....
    (b) the proceedings at which each such attorney represented you.
        I. Notice of appeal to Iowa Supreme Court
        ii. .....
        iii. .....

I understand that a false statement or answer to any of the questions contained in this pleading will subject me to penalties for perjury.

JOHN J. MORRISSEY
Signature of Petitioner

Subscribed and Sworn to before
me this 11th day of
September, 1969.
(month) (year)

Wm. F. Abel
Notary Public
My commission expires
July 4, 1972
(Month, Day, Year)

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
EASTERN DIVISION

JOHN J. MORRISSEY, #29739,
Petitioner,

vs.

LOU V. BREWER, Warden,
Respondent.

Civil No. 2-468-E
Notice of Transfer of This Cause from a Pretermitted Division

[Filed, Sep 12 1969, R. E. Longstaff *Clerk,* U.S. District Court Southern District of Iowa]

* * * *

Pursuant to the provisions of subsisting Order of Pretermission and Rule No. 2, Local Rules of the United States District Court, Southern District of Iowa, this cause is transferred from the Eastern Division to the Davenport Division of this District, and is now docketed and identified under Civil Number 3-869-D.

Henceforth, all documents presented to the Court and all record entries made by the Court in this cause shall bear in the caption the Civil Number last above written.

Dated this 12th day of September, 1969.

R. E. LONGSTAFF
R. E. Longstaff, *Clerk*

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
DAVENPORT DIVISION

JOHN J. MORRISSEY, #29739

vs.

LOU V. BREWER, Warden

Civil No. 3-869-D
Order To Show Cause

[Filed Sep 19 1969, *Clerk*, U.S. District Court Southern District of Iowa]

This matter is before the court upon the Petition for Writ of Habeas Corpus, filed on September 12, 1969, and the court having examined said Petition and being duly advised in the premises, it appears that the respondent, Lou V. Brewer, Warden, Iowa State Penitentiary, Fort Madison, Iowa, has custody of the Petitioner.

IT IS THEREFORE ORDERED

1. Lou V. Brewer, Warden, respondent, is ordered and directed to show cause why a Writ of Habeas Corpus should not be granted, and said respondent shall make return certifying the true cause of the detention of Petitioner within three days after service of this Order upon him.

2. The Clerk of the United States District Court, Southern District of Iowa, shall forthwith serve this Order upon the respondent by certified mail.

Dated: September 19, 1969.

Roy L. Stephenson
ROY L. STEPHENSON
Chief Judge

9-19-69 Copy mailed to Petitioner &
mailed by certified mail to Atty for Respondent.

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA
DAVENPORT DIVISION

JOHN J. MORRISSEY, *Petitioner,*	
vs.	Civil No. 3-869-D
LOU V. BREWER, Warden, *Respondent.*	Return

[Filed, Oct 13 1969, R. E. Longstaff, *Clerk*, U.S. District Court Southern District of Iowa]

COMES NOW, the respondent, Lou V. Brewer, Warden, Iowa State Penitentiary, Fort Madison, Iowa, by his attorneys and makes Return to the Order to Show Cause issued herein as follows:

1. That the petitioner, John J. Morrissey, is presently detained under authority of a mittimus issued from the District Court of Iowa, Linn County, pursuant to the revocation of his parole, pursuant to Section 247.28 of the 1966 Code of Iowa. Petitioner, on January 5, 1967 plead guilty to the charge of False Drawing or Uttering of Checks in violation of Section 713.3, 1962 Code of Iowa; was paroled on June 20, 1968 and sent back to the Iowa State Penitentiary, Fort Madison, Iowa on or about January 31, 1969 for parole violation.

2. That the petition for writ of habeas corpus filed herein is insufficient and a writ of habeas corpus should not be issued for the reasons set forth in the attached memorandum in support of this return.

RICHARD C. TURNER,
Attorney General of Iowa
By Michael J. Laughlin
MICHAEL J. LAUGHLIN
Assistant Attorney General
State House, Des Moines, Iowa
Attorneys for Respondent.

CERTIFICATION

It is hereby certified by the undersigned that the cause of detention of the petitioner set forth in Paragraph 1 of the appended return is true and correct.

RICHARD C. TURNER
Attorney General of Iowa
By Michael J. Laughlin
MICHAEL J. LAUGHLIN
Assistant Attorney General
State House, Des Moines, Iowa
Attorneys for Respondent

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA
DAVENPORT DIVISION

JOHN J. MORRISSEY,
Petitioner,

vs.

LOU V. BREWER, Warden,
Respondent.

Civil No. 3-869-D
Memorandum in Support of Return

[Filed, Oct 13 1969, R. E. Longstaff *Clerk*, U.S. District Court Southern District of Iowa]

STATEMENT OF THE CASE

On January 5, 1967, the petitioner entered a plea of guilty in the District Court of Iowa, Linn County, to charge of False Drawing or Uttering of Checks in violation of Section 713.3 of the 1962 Code of Iowa. He was sentenced to a term of seven years at the Iowa State Penitentiary, Fort Madison, Iowa. On June 20, 1968 petitioner was granted a parole from the Iowa State Penitentiary. On January 31, 1969 the petitioner was arrested for parole violation and was returned to the Iowa State Penitentiary, Fort Madison, Iowa. Petitioner applied for a writ of Habeas Corpus in the District Court of the State of Iowa, Linn County, Iowa, which application was denied on the 26th day of June, 1969. Petitioner then sought appeal to the Supreme Court of the State of Iowa and said appeal was dismissed on September 15, 1969.

ARGUMENT

Petitioner asserts that he was deprived of his constitutional rights when he was arrested for parole violation and sent back to prison upon having his parole revoked. More specifically petitioner contends that a hearing should have been held to determine whether his parole status was legally revoked according to law. Petitioner contends that the revocation of his parole without notice and hearing constitutes a denial of due process and that Section 246.26 of the 1966

Code of Iowa which provides for such revocation of probation on parole without notice and hearing is unconstitutional in violation of the Fourteenth Amendment to the United States Constitution.

There is no merit in petitioner's contention that he was denied due process in the revocation of his parole. One returned to imprisonment as a parole violator is not entitled to a hearing or a judicial review of the actions of the State Parole Board in revoking the petitioner's parole.

In the leading case of *Curtis* v. *Bennett*, 256 Iowa 1164, 131 N.W.2d 1, the Iowa Supreme Court stated the applicable law in this type of situation (256 Iowa at 1167):

> "Iowa is among the majority of states which have consistently held that under statutes relating to revocation of probation or suspension of sentence which contain no express provision for notice and hearing, such a revocation without notice and hearing does not constitute a denial of due process."

In *State* v. *Rath*, 258 Iowa 568, 139 N.W.2d 468, the Iowa Supreme Court again examined and reaffirmed its previous decisions to the affect that a parolee has no rights in connection with the revocation of his parole or probation.

The Federal Courts have also been in agreement with the Iowa rule and have held that a parolee has no constitutional right to notice and a hearing on the question of revoking his probation or parole. See *Rose* v. *Haskins*, 388 F.2d 91; *Curtis* v. *Bennett*, 351 F.2d 931; *Hutchinson* v. *Patterson*, 267 F.Supp. 433; *United States* v. *Hartsell*, 277 F.Supp 933.

The petitioner cites the case of *Mempa* v. *Rhay*, 389 U.S. 128, 88 S.Ct. 254, as authority for the proposition that he should have been granted a hearing upon revocation of his probation. However *Mempa* is clearly distinguishable from the case at bar:

In the instant case, sentencing had been completed, the criminal proceeding had ended and plaintiff had been accorded conditional liberty by legislative grace. In *Knight* v. *State*, Md., 255 A.2d 441, the appellant, on appeal from the revocation of his probation and suspended sentence on two convictions, claimed, as does plaintiff here, that he was denied right to counsel at the time of his revocation hearing

as required by *Mempa*. In rejecting the contention, the Maryland Court of Special Appeals stated (255 A.2d at 447 and 448):

> "We think it clear that rationale of *Mempa* is that, as the *imposition* of sentence is a critical stage of a criminal proceeding, a defendant has the right to counsel at any proceeding at which sentence is *imposed*, no matter how the proceeding is characterized. We limit *Mempa* to this context. We do not find its holding to be that every hearing for a judicial determination as to whether the conditions of probation have been violated invokes the right to counsel. . . ." Emphasis added.

Thus, it is well established that a parolee in Iowa has no constitutional right to notice and a hearing on the issue of revoking his parole.

CONCLUSION

For all the above reasons, respondent respectfully submits that the petition for writ of habeas corpus should be denied.

Respectfully submitted,
RICHARD C. TURNER,
Attorney General of Iowa
By Michael J. Laughlin
MICHAEL J. LAUGHLIN
Assistant Attorney General
State House, Des Moines, Iowa
Attorneys for Respondent

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA
DAVENPORT DIVISION

JOHN J. MORRISSEY #29739
Petitioner,

vs.

LOU V. BREWER, Warden I.S.P.
Respondent.

Civil No. 3-869-D
Transverse

[Filed, Oct 20 1969, *Clerk*, U.S. District Court Southern District of Iowa]

Comes now the petitioner John J. Morrissey #29739, of the Iowa State Penitentary at Fort Madison-County of Lee-State of Iowa without the assistance of counsel to transverse and deny the allegations set forth in the respondents return to show cause order in the above captioned civil case.

Not being a student of law the petitioner begs the courts indulgence to proceed in this matter to the best of my abilities and knowledge.

Petitioner states that the respondent errored in his return to order motion in naming the court (county) where the habis corpus action was started.

Petitioner further states that the respondent errored also in stating the petitioner used Section 246.26-1966 Code of Iowa as a basis for the alleged violation of constitutional rights.

Petitioner further states that the respondent did not in his return or memorandium of return answer the charges set out by the petitioner in Civil Action No. 3-869-D.

For the reasons set forth in the attached memoradium in support of transverse the petitioner shows why the writ

of habeas corpus does have merit and does show violation of the petitioners constitutional rights by the respondent.

Respectfully submitted,
/s/ John J. Morrissey
JOHN J. MORRISSEY #29739
Petitioner

Signed and subscribed before me this 17 day of Oct 1969:

Wm. F. Abel
Notary Public In and For
The County of Lee at
Fort Madison, Iowa

My commission expires July 4, 1972

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA
DAVENPORT DIVISION

JOHN J. MORRISSEY #29739
Petitioner,

ys.

LOU V. BREWER, Warden I.S.P.
Respondent.

Civil No. 3-869-D
Memorandium in Supplement of Transverse

[Filed, Oct 20 1969, *Clerk*, U.S. District Court Southern District Of Iowa]

On or about June 20th, 1968 petitioner was granted a parole from the Iowa State Penitentiary at Fort Madison, Iowa.

On or about January 31, 1969 petitioner was arrested in Linn County-City of Cedar Rapids, Iowa on a warrant namely Section 247.28 of the 1966 Code of Iowa and was placed in the Linn County Jail for a period of about two weeks without the benefit of counsel or being afforded an opportunity to make bail. Without giving the petitioner the chance to answer charges against him petitioner was then illegally returned and illegally imprisoned at the Iowa State Penitentary at Fort Madison, Iowa. By the respondent or his agents.

By not affording the petitioner due process of law the respondent violated petitioners constitutional rights to due process of law.

ARGUMENTS FOLLOW

1. Provisions of the 14th Amendment to the United States Constitution extend to all actions of a state court denying equal protection of the laws, what so ever the agency of the state taking the action.

Avery 88 SS Ct. 1114

2. Whoever, while on parole shall violate any rule, regu-

lation or condition of said parole, shall be deemed guilty of a felony. . . . Section 247.28 1966 Code of Iowa.

3. If the offense stated on the warrant be a felony the officer making the arrest shall take the defendant before the magistrate who signed the warrant, or in his absence, a magistrate in the county of his arrest . . . Section 757.2 1966 Code of Iowa
4. When a person is held for a public offense, if an indictment is not found against him at the regular term of court or within thirty days which ever occurs first, the court in its own motion dismiss the charge. Section 795.1 1966 Code of Iowa
5. No person can be punished for a public offense except by a court of record having jurisdiction. Section 687.5 1966 Code of Iowa
6. No felony or public offense can be comparmissed. Section 794.4 1966 Code of Iowa
7. No person can be subjected to a bill of pains, nor can a prison keeper of records increase the penalty asseded by a court of records in the United States (Construed) U.S. Constitution Article 1 Section 9 Clause 2,3 Article 1 Section 10 Clause 1
8. In cases regarding the liberty of an individual the accused shall be informed of the charges against him, shall have a chance to confront his tormenters, and shall be provided counsel (per Se)

Constitution of State of Iowa
Article 1 Section 10.

The petitioner respectfully points out to the court that in the habeas corpus application 3-869-D it was stated that previous action was in Lee County District Court. Further that in question No. 12, Part A, of the same application, Section 247.28 was specified not Section 246.26 as stated by the respondent.

Petitioner further wishes to make clear that the hearing reffered to in said application as per question No. 12, part B is the hearing required by law as set out in point (3) three of this transverse.

end page 1 Supplement, continued on page 2

page 2 of Supplement continued below

Petitioner states that when returned to the penitentiary he was given a new discharge date which added more time to his sentence and by doing this in effect did present the petitioner with a bill of pains directly associated with the felony arrest previously mentioned in point 1. The aforementioned act was done by the prision keeper of records or his agents and not in a court of records as prescribed by law. Reference to this can be made when the U.S. Supreme Court ruled on an Iowa Case and so stated that a prison keeper of records could not extend any sentence. Re: Bonner 151 U.S. 242 (Iowa) 14 S Ct. 323.

The Constitution of the United States says a person may not be deprived of his liberty without due process of law. So when a person who is arrested by an agency of the state for a felony, on a warrant for a felony, has the person imprisoned and deprived of his liberty with no chance to hear the charges against him nor face his accusors, nor have counsel, nor bail, nor exoneration at law it must clearly be and is deprived and has deprived the petitioner of equal protection of the laws afforded him in the Constitution of the United States.

Conclusion below

For the aforementioned statements of fact the petitioner prays that writ of habis corpus be sustained and the petitioned be released forthwith from illegal confinement.

Petitioner further prays that the charge of parole violation be vacated and set aside for untimely prosecution and that the parole board of the State of Iowa be ordered to discharge the petitioner from all obligations of his parole granted June 20th, 1968, for in the absence of the violation of his constitutional rights petitioner would have been discharged before this date.

I John J. Morrissey do state under oath that the contents of the attached transverse and supplement in support of

transverse, arguments and conclusion contained in them are true and correct to the best of my knowledge and beliefs.

Respectfully,
John J. Morrissey
JOHN J. MORRISSEY #29739
Petitioner

Subscribed and sworn before me on this 17 day of Oct 1969:

Wm. F. Abel
Notary Public In and For
The County of Lee
At Fort Madison, Iowa

My commission expires July 4 1972:

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA
DAVENPORT DIVISION

[Filed, Oct 24 1969, R. E. Longstaff, *Clerk*, U.S. District Court Southern District of Iowa]

JOHN J. MORRISSEY,
Petitioner,
vs.
LOU V. BREWER, Warden,
Respondent.

Civil No. 3-869-D
Supplement To Return

COMES NOW the respondent, Lou V. Brewer, Warden, Iowa State Penitentiary, Fort Madison, Iowa, by his attorneys and hereby files a supplement to his previously filed Return in the above captioned matter.

The above referred to supplement consists of a copy of a case handed down on October 14, 1969, by the Supreme Court of the State of Iowa entitled *Cole* v. *Holliday* * which reinforces respondent's contention that notice and hearing is not required to revoke probation of an individual placed on parole.

RICHARD C. TURNER
Attorney General of Iowa

By Michael J. Laughlin
MICHAEL J. LAUGHLIN
Assistant Attorney General
State House, Des Moines, Iowa
Attorneys for Respondent

* Reported and appears at 171 N.W. 2d 603 (Iowa 1969)

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA
DAVENPORT, IOWA

JOHN J. MORRISSEY #29739
Petitioner,

vs.

LOU V. BREWER, Warden
Respondent.

Civil No. 3-869-D
Supplement to
Traverse

[Filed, Oct 31 1969, R. E. Longstaff, *Clerk*, U.S. District Court Southern District of Iowa]

Comes now the Petitioner John J. Morrissey #29739, without benefit of counsel, to file a supplement to his previously filed traverse in Civil No. 3-869-D.

On October 13th, 1969 the respondent filed a return to motion to the action (Civil #3-869-D) In the United States District Court-Davenport Division, stating the Petitioner John J. Morrissey #29739 was being held at The Iowa State Penitentiary on a mittimus supposedly issued by the District Court of Iowa, Linn County, pursuant to section 247.28 of the 1966 Iowa Code.

I have repeatedly requested a copy of that mittimus from the court agent of the respondent, But as yet six months later I still have received no copy of said mittimus. I contend that there is no such mittimus and consequently no authority for the respondent to hold legally the petitioner John J. Morrissey.

The respondent continues to evade the issues at bar that are clearly set forth in the original copy filed in this court. I have stated before the respondent has no defense for his actions and is trying to cloud the issue at bar, for some reason, by bringing before the court a completely alien matter to the point of question.

There has been a gross violation of the Iowa Code which sets forth the procedures which shall be used in any felony arrest undertaking. By the fact of that violation the constitutional right of the Petitioner to the equal protection of the laws has also been greatly violated.

Petitioner again prays to the court for the vacating and

setting aside of the charge Parole Violation (247.28) because of lack of prosecution.

Petitioner futher prays that the court will order the immediate release of the petitioner from illegal confinement and an absolute release from the parole granted on June 20th, 1968. If the constitutional rights of the defendent and petitioner had not been violated he would have been discharged before this date.

For all the above reasons, Petitioner respectfully submits that the petition for Writ of Habeas Corpus be granted.

/s/ John J. Morrissey
JOHN J. MORRISSEY
Petitioner
Box 316, Fort Madison, Iowa

Subscribed and sworn before me this 29th day of October 1969:

/s/ Bernard J. Pollpeter
Notary Public In and For
Lee County-Fort Madison, Iowa

My Commission expires 4 July 1972:

Date 11-8-69 Number 29739
From John J. Morrissey
Box 316, Fort Madison, Iowa—52627

[Filed Nov 28 1969 R. E. Longstaff *Clerk*, U.S. District Court Southern District of Iowa]

To Clerk of U.S. District Court
Street No. Southern District of Iowa
City Des Moines State Iowa Zip 50309

Mr. R. E. Longstaff *Clerk*
U.S. District Court
Southern District: In re: 3-869-D civil number.

Sir:

In answer to your letter of 11-6-69 I am enclosing the original copy of the letter I received from Ken. L. Perry Sr. Clerk of District Court, Linn County Iowa.

Sincerely
John J. Morrissey
29739 Box 316
Ft. Madison, Ia., 52627

Date 10-27-69 Number 29739
From John J. Morrissey
Box 316, Fort Madison, Iowa—52627

[Filed Nov 28 1969 R. E. Longstaff *Clerk*, U.S. District Court Southern District of Iowa]

Kenneth Perry, Clerk
Linn Co. District Court

Sir:

I have a letter from the Attorney General of Iowa stating that on or about Jan. 31, 1969 there was a mittimus issued in District Court of Linn County Cedar Rapids Iowa, pursuant Section 247.28 of the 1966 Iowa Code. That mittimus is stated as the authority by which 29739 John J. Morrissey is being detained at the Iowa State Penitentiary at Ft. Madison, Iowa.

I would like a copy of that mittimus.

I know of the mittimus issued from the above mentioned court in the name of John J. Morrissey on Jan. 5, 1967 pursuant Section 713.3 1962 Iowa Code, and have a copy of same.

The mittimus I want a copy of was supposed to have been issued on or about Jan. 31, 1969 for the violation of Section 247.28, 1966 Iowa Code.

The need for the information about this mittimus is urgent as the case is before the court now.

Sincerely
John J. Morrissey

Mr. Morrissey:

According to our records, we did not issue a mittimus on or about January 31, 1969.

Sincerely,
Kenneth L. Perry, Sr.
KENNETH L. PERRY, SR.
Clerk of District Court
Linn County, Iowa

KLP:cs

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA
DAVENPORT DIVISION

[Filed Nov 28 1969, R. E. Longstaff, *Clerk*, U.S. District Court Southern District of Iowa]

JOHN J. MORRISSEY,
Petitioner,
vs.
LOU V. BREWER, Warden,
Respondent.

Civil No. 3-869-D
Order

This matter is before the Court on the petition of John J. Morrissey for a writ of habeas corpus.

Return filed on behalf of the respondent herein to the Court's show cause order indicates that Morrissey is presently detained under the authority of a mittimus issued by the Linn County Iowa District Court, pursuant to the revocation of Morrissey's parole. The revocation is said to be based on Iowa Code § 247.28 (1966).

By letter, Morrissey indicates to the Court that he has information suggesting that no such mittimus exists. Included with the letters received by the Court is a letter apparently received by Morrissey and written by Kenneth L. Perry, Sr., Clerk of the Linn County Iowa District Court. Morrissey requests permission to append the foregoing information to his petition.

IT IS ORDERED:

1. That all letters of correspondence between the Clerk of the Court and the petitioner herein relating to the foregoing allegations be filed as amendments to the petition herein.

2. That the respondent have and is hereby granted twenty days from the date of this order to respond to issues arising as a result thereof.

3. That the Clerk of Court furnish copies of the aforesaid letters to the respondent along with a copy of this order.

Dated this 28th day of November, 1969.

Ray L. Stephenson
Chief Judge

11-28-69 Copy to petitioner & Atty. General.

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA
DAVENPORT DIVISION

[Filed Dec 18 1969, R. E. Longstaff, *Clerk*, U.S. District Court Southern District of Iowa]

JOHN J. MORRISSEY,
Petitioner,
vs.
LOU V. BREWER, Warden,
Respondent.

Civil No. 3-869-D
Amended Return

COMES NOW the respondent, Lou V. Brewer, Warden, Iowa State Penitentiary, Fort Madison, Iowa, by his attorneys and hereby files an Amended Return to his previously filed Return in the above captioned matter.

STATEMENT OF THE CASE

In the previously filed Return respondent stated that petitioner, John J. Morrissey, is presently being detained under authority of a mittimus issued from the District Court of Iowa, Linn County, pursuant to a revocation of his parole. Perhaps this language misleads the petitioner into believing that the Linn County District Court did or should have issued another mittimus when petitioner was taken into custody for parole violation on or about January 31, 1969. No such mittimus was issued or was required to be issued by the Linn County District Court to return the prisoner to the Fort Madison Penitentiary. The mittimus referred to in respondent's previously filed Return refers to the mittimus issued by the Linn County District Court in 1967 sentencing petitioner to a term of seven years at the Iowa State Penitentiary at Fort Madison, Iowa.

In answering the petitioner's Traverse, filed October 20, 1969, the respondent files this Amended Return in hopes that it will clear up some of the confusion the petitioner seems to be laboring under, and hereby amends his Return and states as follows:

ARGUMENT

That the petitioner entered a plea of guilty on January 5, 1967, in the District Court of Iowa, Linn County, to a charge of False Drawing or Uttering of Checks in violation of Section 713.3 of the 1962 Code of Iowa. He was sentenced to a term of seven years at the Iowa State Penitentiary, Fort Madison, Iowa, and a mittimus was issued by the Linn County District Court pursuant to such sentencing. Said mittimus was the mittimus referred to in respondent's previously filed Return.

That on June 20, 1968, the petitioner was granted a parole from the Iowa State Penitentiary at Fort Madison, Iowa, and on or about January 31, 1969, the petitioner was arrested for parole violation and was returned to the Iowa State Penitentiary at Fort Madison.

That petitioner contends that he is presently being unlawfully detained at the Iowa State Penitentiary at Fort Madison, Iowa, because there was no mittimus issued for his return to the Penitentiary subsequent to his arrest for parole violation in January of 1969.

That the Linn County District Court was not required, nor did it, issue a mittimus pursuant to petitioner's return to the Fort Madison Penitentiary subsequent to petitioner's arrest on or about January 31, 1969, on the charge of parole violation. In the instant case, the authority for returning petitioner to the Fort Madison Penitentiary was a warrant issued by the Parole Board to apprehend and return the petitioner to the Penitentiary because he violated provisions of his parole, a copy of said warrant being attached to this Amended Return.

That it is the policy of the Iowa Board of Parole that it may execute a warrant for the arrest of an individual it has paroled if said individual has violated his parole, and such warrant is authority for apprehending such parole violator and returning him to the Penitentiary. This is done without any mittimus being issued by any court in the county wherein the parole violator is arrested prior to his return to the Penitentiary for parole violation. It should be noted that Section 247.9, 1966 Code of Iowa pertains to this matter and provides in part that:

> "All paroled prisoners shall remain, while on parole, in the legal custody of the warden or superintendent and under the control of said board, and shall be sub-

ject at any time, to be taken into custody and returned to the institution from which they were paroled."

That since there was a warrant executed on the petitioner by the Parole Board for parole violation; and since the petitioner was in the legal custody of the respondent, Warden and under the control of the Parole Board, while petitioner was on parole, pursuant to Section 247.9, 1966 Code of Iowa, there was no reason and no requirement that the Linn County District Court should issue a mittimus for petitioner's return to the Iowa Penitentiary at Fort Madison, Iowa.

That petitioner alleges he should have had a hearing when he was arrested for parole violation on or about January 31, 1969. This issue was covered in the respondent's previously filed Return and then subsequently in respondent's Supplement to Return wherein the case of *Cole* v. *Holliday*, — Iowa —, 171 N.W.2d 603, was cited which reinforced respondent's contention that notice and hearing was not required to revoke probation of an individual placed on parole.

That the respondent hereby amends page 2, line 3, of his previously filed Memorandum in Support of Return (Civil No. 3-869-D, filed October 13, 1969) by changing "Section 246.26, of the 1966 Code of Iowa" to read "Section 247.28, of the 1966 Code of Iowa."

That the respondent hereby amends page 1, line 11, of his previously filed Memorandum in Support of Return (Civil No. 3-869-D, filed October 13, 1969) by changing the word "Linn County" to "Lee County." Such amendment refers to the county wherein petitioner filed his first habeas corpus action in this matter.

Respectfully submitted,
RICHARD C. TURNER
Attorney General of Iowa

By Michael J. Laughlin
MICHAEL J. LAUGHLIN
Assistant Attorney General
Attorneys for respondent

Iowa Board of Parole
Des Moines

[Filed 1969 JUN 25 AM 9:22, District Court, Lee County, Iowa, Lyle B. Miller, *Clerk*

STATE OF IOWA
County of Polk, } ss.

Know All Men by These Presents:

That JOHN J. MORRISSEY, #29739-FM was on the 5th day of JANUARY 1967, convicted in the District Court of LINN County and State of Iowa, of the crime of FALSE CHECK; LARCENY; DESERTION and was sent to the IOWA STATE PENITENTIARY at FORT MADISON, IOWA; that said JOHN J. MORRISSEY was admitted to said IOWA STATE PENITENTIARY on the 6th day of JANUARY, 1967, that in accordance with the provisions of Chapter 192, of the Acts of the Thirty-second General Assembly of Iowa, approved April 2, 1907, and the rules adopted by the Board of Parole; said JOHN J. MORRISSEY was on the 20th day of JUNE, 1968, paroled by said Board of Parole, to go outside of the buildings and enclosure of said IOWA STATE PENITENTIARY, upon the conditions stipulated in a certain parole agreement, executed in duplicate, and signed by said parolee.

AND WHEREAS it has come to the knowledge of the Board of Parole that said JOHN J. MORRISSEY has violated the conditions of said parole agreement and has thereby forfeited his right to remain longer on parole, therefore, it is hereby ordered by said Board that said JOHN J. MORRISSEY be forthwith arrested and returned to said IOWA STATE PENITENTIARY to serve as much of the remainder of his sentence as said Board shall hereafter determine.

It is further ordered that Warden's Authorized Officer, or any Sheriff or Peace Officer of the State of Iowa be and he is hereby authorized and directed to arrest said JOHN J. MORRISSEY whenever and wherever found, and return him to the said IOWA STATE PENITENTIARY

WITNESS the Board of Parole of the State of Iowa by its Chairman and Secretary, at Des Moines, this 31st day of JANUARY, A.D. 1969.

Illegible

Chairman,

Certified by Illegible

Secretary.

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA
DAVENPORT DIVISION

[Filed Dec 23 1969, R. E. Longstaff, *Clerk*, U.S. District Court Southern District of Iowa]

JOHN J. MORRISSEY,
Petitioner,
vs.
LOU V. BREWER, Warden,
Respondent.

Civil No. 3-869-D
Order

This matter is before the Court on the petition of John J. Morrissey, hereinafter referred to as petitioner, for a writ of habeas corpus.

Petitioner has alleged, among other things, that when he was returned to the penitentiary following his arrest for parol violation he was given a new discharge date which added more time to his sentence. Petitioner seems to believe this action was taken pursuant to Iowa Code § 247.28 (1966).

The Court notes that respondent has not addressed himself to this issue raised by petitioner.[1]

Therefore, IT IS ORDERED that the respondent shall, within ten days of the date of this order, file a supplemental response addressed to the issue heretofore described.

IT IS FURTHER ORDERED that petitioner shall have an additional ten days thereafter to file a supplemental traverse thereto.

Dated this 23rd day of December, 1969.

RAY L. STEPHENSON
Chief Judge

12-23-69 Copy to Petitioner & Atty. Gen'l.

[1] The Court does not know, for example, whether this issue has been presented to the state courts.

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA
DAVENPORT DIVISION

[Filed Jan 5 1970, R.E. Longstaff, *Clerk*, U.S. District Court Southern District of Iowa]

JOHN J. MORRISSEY,
Petitioner,

vs.

LOU V. BREWER, Warden,
Respondent.

Civil No. 3-869-D
Supplement to Return

COMES NOW, the respondent Lou V. Brewer, Warden, Iowa State Penitentiary, Fort Madison, Iowa, by his attorneys and hereby files a supplement to his previously filed Return in the above captioned matter.

STATEMENT OF THE CASE

In a previously filed memorandum in support of a previously filed Return the respondent stated the facts of this case and will set them forth again.

On January 5, 1967, the petitioner entered a plea of guilty in the District Court of Iowa, Linn County, to the charge of False Drawing or Uttering of Checks in violation of Section 713.3, of the 1962 Code of Iowa. He was sentenced to a term of seven years at the Iowa State Penitentiary, Fort Madison, Iowa. On June 20, 1968, petitioner was granted a parole from the Iowa State Penitentiary. On January 31, 1969, the petitioner was arrested for parole violation and was returned to the Iowa State Penitentiary, Fort Madison, Iowa. Petitioner applied for a writ of habeas corpus in the District Court of the State of Iowa, Lee County, Iowa, which application was denied on the 26th day of June, 1969; a copy of which order denying petitioner's writ is attached hereto. Petitioner then sought appeal to the Supreme Court of the State of Iowa and said appeal was dismissed on September 15, 1969, on motion by the State a copy of which motion and order dismissing the appeal is attached to this supplemental return. The Iowa Supreme Court dismissed the petitioner's

appeal without considering the merits of petitioner's appeal.

ARGUMENT

Respondent has previously filed in this matter, an amendment to his previously filed Return, wherein respondent reaffirmed the argument presented in his previously filed Return. The petitioner in this case entered a plea of guilty in the District Court of Iowa, Linn County, to a charge of False Drawing or Uttering of Checks in violation of Section 713.3 of the 1962 Code of Iowa, and was sentenced to a term of seven years at the Iowa State Penitentiary, Fort Madison, Iowa. On June 20, 1968, petitioner was granted a parole from said institution, and on or about January 31, 1969, the petitioner was arrested in Linn County for parole violation and was subsequently returned to the Fort Madison Penitentiary pursuant to a warrant issued by the Parole Board, a copy of which has been filed with this court in Respondent's Amended Return. The Parole Board was acting in pursuance to Sections 247.26 and 247.28 of the 1966 Code of Iowa which provides:

> "247.26 Revocation of probation. A suspension of a sentence by the court as herein provided may be revoked at any time, without notice, by the court or judge, and the defendant committed in obedience to such judgment.
>
> * * *
>
> "247.28 Violation of Board parole. Whoever, while on parole, shall violate any condition of his parole, or any rule or regulation of the board granting the parole, shall be deemed guilty of a felony, and shall be punished by imprisonment in the institution from which he had been paroled, for a term of not more than five years, his sentence under such conviction to take effect upon the completion of his previous sentence."

No mittimus was issued out of the Linn County District Court for the petitioner's return to Fort Madison penitentiary for parole violation, and no mittimus was required to be issued for the reasons stated in respondent's argument in his previously filed Amended Return. Also no hearing was held or required to be held regarding the issue of petitioner's parole violation. The authority for

not having such a hearing follows a long line of Iowa cases on that issue and is reaffirmed in the case of *Cole* v. *Holliday*, — Iowa —, 171 N.W.2d 603, a copy of which was filed with this court in the instant case in respondent's previously filed Supplement to Return.

The respondent has filed a number of papers with this court in an attempt to answer the issues raised by the petitioner and respondent believes he has adequately answered petitioner's contentions in respondent's previously filed Return, Supplement to Return, and Amended Return.

CONCLUSION

For all of the above reasons, respondent respectfully submits that the petition for writ of habeas corpus should be denied.

Respectfully submitted,
RICHARD C. TURNER
Attorney General of Iowa

By Michael J. Laughlin
MICHAEL J. LAUGHLIN
Assistant Attorney General
Attorneys for respondent

IN THE SUPREME COURT OF IOWA

JOHN J. MORRISSEY,
Petitioner

v.

LOU V. BREWER,
Warden of Iowa State Penitentiary,
Respondent

Order
Denying Writ
of Habeas Corpus

The petition of John J. Morrissey, filed here July 8, 1969 for a writ of habeas corpus, together with the papers attached thereto, have been duly considered. The said petition is hereby denied for the following reasons:

1. The petition is not made to the court or judge most convenient in point of distance to the petitioner, as required by sections 663.4 and 663.5 Iowa Code.

2. The legality of petitioner's imprisonment has already been adjudged by prior proceedings of the same character, as appears from the papers attached to the petition filed herein, and if petitioner is entitled to any relief his remedy would be to appeal from the denial of his petition by the District Court of Lee County.

This order is appended to petitioner's file herein and returned to petitioner, as provided by Code section 663.7.

DONE this 25th day of July, 1969.

Supreme Court of Iowa
By /s/ T. G. Garfield
Chief Justice

IN THE SUPREME COURT OF IOWA

[Filed Sep 15 1969, Helen M. Lyman, *Clerk*, Supreme Court]

JOHN J. MORRISSEY,
Petitioner

v.

LOU V. BREWER, Warden,
Respondent

No. 53826
Order

Respondent's motion to dismiss the above entitled appeal is sustained. Appeal dismissed.

Done this 15th day of September, 1969.

T. G. GARFIELD
Chief Justice—Iowa Supreme Court

Copies mailed to David A. Elderkin, Asst. Atty. Gen.
Austin J. Rashid, Fort Madison, Iowa

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA
DAVENPORT DIVISION

[Filed Jan 9 1970, R. E. Longstaff, *Clerk*, U.S. District Court Southern District of Iowa]

JOHN J. MORRISSEY,
Petitioner

vs.

LOU V. BREWER, Warden
Respondent.

Civil: No. 3-869-D
Supplement to traverse

Comes now, John J. Morrissey, petitioner, without benefit of counsel, and hereby files supplement to his previously filed traverse in the above named action.

STATEMENT OF THE CASE

In a previously filed traverse and in the support of same petitioner states that he was sentenced in Linn County District Court (mittimus attached). On June 20, 1968, petitioner was paroled by the Parole Board of the state of Iowa. That parole was revoked and petitioner was returned to the Iowa Penitentiary without benefit of DUE PROCESS OF LAW and was denied the equal protection of the laws.

ARGUMENT

The attached mittimus being an absolute judgement of conviction, not an Alternative or Conditional judgement, the respondent nor any of his agents have the legal right to improve or extend such judgement. But as the facts show this has been done, without jurisdiction, and the excess attributed to a violation of code #247.28 (1966 Iowa). Respondent claims authority to do this is a policy of the Board of Parole. Prohibitions of the fourteenth amendment extend to all agencies of the state denying due process of law. Yet, respondent claims the policy of the Board of Parole, a state agency, has the power to usurp the constitutional rights of persons by having them arrested and imprisoned on a warrant, not a judgement of conviction, from a court of proper jurisdiction. A person cannot be ajudged

guilty of a public offense except by a Court of Record, according to the laws. Still, again as a matter of fact, the respondent holds that the Board of Parole and it's policies can supplant a court of jurisdiction and wantonly deprive persons of their liberty, at their own personal whim, without benefit of exoneration at law. Respondent claims that no action of a court is needed in the, and I quote "revocation of ones probation while on parole". It is an impossibility to perform this action. Probation and Parole are two completely different actions, originating at two different points and by two different bodies. Probation is granted by the Court of proper jurisdiction, while Parole is granted by the Board of Parole. When one's probation is revoked, even by the Board of Parole, a judgement of conviction is signed by the proper Court and proceeds with the person named thereon to the proper place of confinement as an authority for the Warden of that institution to hold such person until said sentence is completed or the person is released by parole. There is statutory provision made to do this. Statutory provision is also made for the revocation of one's parole but the DUE PROCESS OF LAW is circumvented by the Board of Parole in the returning of a parolee, without benefit of his constitutional rights, to an institution that illegally accepts the parolee on a warrant instead of a judgement of conviction as prescribed by law.

Petitioner has stated before that the respondent keeps clouding the issue before the Court by bringing into the issue the unrelated topic of Probation. Respondent has repeatedly cited Court precedents in connection with Probation. Probation and Parole are two different actions and are dealt with by the Code of Iowa as two separate actions both as to their instigation and demise. The revocation of a Parole is a felony and there is provision in law for the arrest and conviction of felonies. But these provisions are supplanted by the policy of a state agency namely the Board of Parole and are condoned and adhered to by the respondent as Warden of the penitentiary.

Respondent has not answered the allegations set forth in the orginial application for Writ of Habeas Corpus to this Court, even after being asked to by the court. Respondent has no legal reason for his actions in the detention of petitioner. Respondent by his actions has rendered the revocation of the petitioner's parole untimely as pre-

scribed by law therefore has no authority to imprison or detain said petitioner.

CONCLUSION

For the aboved stated reasons petitioner respectfully submits that the Writ of Habeas Corpus should be granted and petitioner freed from illegal confinement.

Respectfully submitted,
John J. Morrissey
Petitioner
29739 Box 316
Fort Madison, Iowa.

Subscribed to and sworn before me this 7th day of Jan 1970.
Notary in and for
Lee County, Ft. Madison, Ia. Wm. T. Abel

My commission expires July 4, 1972.

ATTACHED DOCUMENTS:

ONE(1) JUDGEMENT OF CONVICTION(LINN COUNTY DISTRICT COURT)

ONE(1) INMATE MEMO STATING DISCHARGE DATES OF PETITIONER IN SUPPORT OF AFOREMENTIONED ALLEGATION THAT THE SAME WAS EXTENDED BY RESPONDENT.

Iowa State Penitentiary

INMATE MEMO

From Morrissey 29739 17-H-1 Date 12-29-69

NAME NUMBER CELL HOUSE

To: Record Clerk I request an

A copy of my original mittimus issued by Linn County. My original discharge date on that mittimus. My discharge date now. (After my return on parole violation.)

I need these for use in a legal proceedings.

DO NOT WRITE BELOW THIS LINE

Date Received

Remarks: Original Discharge Date: August 6, 1970
Present Discharge Date: January 20, 1971

C. E. Wilkens
R. C.

MITTIMUS. To be made in duplicate.
(One copy for Warden.)
(One copy to be returned to Clerk.)

STATE OF IOWA, LINN COUNTY,	ss.	In the District Court of said County, at the October Term, A.D. 1966 Present: the Honorable William R. Eads Judge of the Eighteenth Judicial District; Walter H. Grant, Sheriff, and Kenneth L. Perry, Sr., Clerk of said Court.
STATE OF IOWA, vs. JOHN J. MORRISSEY		No. 21861, Criminal Docket

The State of Iowa to the Sheriff of said County, Greeting:

Whereas, at a Term of the District Court in and for said County, began and held at the Court-House in the City of Cedar Rapids, in said County, on the 3rd day of October, A.D. 1966; on the 13th day of December A.D. 1966 John J. Morrissey was informed against of the crime of False Uttering of a Check (Sec. 713.3, 1966 Code of Iowa) (a True Information was filed, charging the defendant with the crime of False Uttering of a Check) and on the 3rd day of January A.D. 1967 said John J. Morrissey pled guilty of the crime of False Uttering of a Check (Sec. 713.3, 1966 Code) and on the 5th day of January A.D. 1967, was sentenced to be confined in the Iowa State Penitentiary at Fort Madison in said State, for the term of not exceeding at Seven (7) Years from date of admittance, at hard labor, as provided under Section 713.3 and 713.1 of the 1966 Code of Iowa, and to pay the costs of prosecution taxed at $27.25. Sentence to be served concurrently with sentences in Causes No. 21781 and 21518.

WE THEREFORE COMMAND YOU, that you take the body of the said John J. Morrissey now confined in the jail of said County, and convey him to the Iowa State Penitentiary at Fort Madison, in said State, therein to be confined in accordance with the sentence aforesaid; and we

also command the Warden of the Iowa State Penitentiary at Fort Madison aforesaid to receive the body of the said John J. Morrissey and him confine in the said State Penitentiary for the term of not exceeding Seven (7) Years, at hard labor, and for so doing this shall be his sufficient warrant.

Appeal Bond fixed at $1,000.00. Dollars

In TESTIMONY WHEREOF, I Kenneth L. Perry, Sr., Clerk of our District Court aforesaid, have hereunto set my hand and affixed the seal of said Court, this 6th day of January A.D. 1967

KENNETH L. PERRY, SR.
Clerk

By Illegible
Deputy

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA
DAVENPORT DIVISION

[Filed Jan 23 1970, R. E. Longstaff, *Clerk*, U.S. District Court Southern District of Iowa]

JOHN J. MORRISSEY,
Petitioner,
vs.
LOU V. BREWER, Warden,
Respondent.

Civil No. 3-869-D
Supplement to return

COMES NOW the respondent, Lou V. Brewer, Warden, Iowa State Penitentiary, Fort Madison, Iowa, by his attorneys and hereby files a supplement to his previously filed Return, Amendment to Return, and Supplement to Return in the above captioned matter.

STATEMENT OF THE CASE

In a previously filed memorandum in support of a previously filed Return the respondent stated the facts in this case.

ARGUMENT

Petitioner contends that his parole was revoked without any type of judicial hearing and thus he was denied his constitutional rights. No hearing or judicial determination is required to revoke a petitioner's parole and to return him to prison. The latest Iowa Supreme Court case on point is *Cole* v. *Holiday*, — Iowa —, 171 N.W. 2d 603, a copy of which has been filed by the respondent in this court.

Petitioner further contends that upon revocation of his parole and return to prison, he was given a new discharge date. Petitioner contends that this was illegal and violated his constitutional rights.

Section 247.12, 1966 Code of Iowa, provides:

> "The time when a prisoner is on parole or absent from the institution shall not be held to apply upon the sentence against the parolee if the parole be violated"

When an individual's parole is revoked, the time he spends on parole does not count toward his sentence and thus when the individual is returned to the institution, his discharge date is naturally moved forward to add to his sentence the time the petitioner was out on parole. This occurred in the instant case pursuant to authority of Section 247.12, 1966 Code of Iowa, and in no way violates petitioner's constitutional rights as he so contends.

The respondent has filed a number of papers with this court in an attempt to answer the somewhat confusing issues raised by the petitioner and respondent believes he has adequately answered petitioner's contentions in respondent's previously filed Return and supplements thereto.

CONCLUSION

For all the above reasons, respondent respectfully submits that the petition for writ of habeas corpus should be denied.

Respectfully submitted,

RICHARD C. TURNER
Attorney General of Iowa

By Michael J. Laughlin
MICHAEL J. LAUGHLIN
Assistant Attorney General

Attorneys for respondent

IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF IOWA
DAVENPORT DIVISION

[Filed Feb 5 1970, R. E. Longstaff, *Clerk*, U.S. District Court Southern District of Iowa]

JOHN J. MORRISSEY
Petitioner

vs.

LOU V. BREWER, Warden
Respondent

Civil No. 3-869-D
Supplement to Traverse

Comes now before the court in the aboved named case, without benefit of counsel, to respectfully informs the court of the following facts.

While acting in his quasi-judicial position one Harold Cerveny, parole agent in and for the Linn County, Iowa district, with the cooperation and affirmance of Harold Moore, Chairman of the Parole Board, and Russell Bobzin secretary to the Parole Board, did cause the petitioner to be arrested for a violation of section 247.28 (1966 Ia. Code) with a warrant on or about 1-31-69.

Petitioner was not afforded his rights as set forth in the constitution of the United States, by the fact that he was arrested, jailed, held without bond, was denied right to counsel, exoneration at law, the judicial process used in a arrest where warrant stated offense was a felony as stated in the Iowa Code (1966), was returned to prison without benefit of a judgement of conviction.

Authorities listed hereto should be ample proof that a person under the Constitution of the United States does not waive his rights to due process or the equal protection of the laws.

Since there was no valid or legal revocation of parole as stated in section 247.28 (1966 Ia. Code) there can be no extention of sentence as stated by Respondent.

Petitioner was paroled and granted his liberty from the original judgment of conviction (1-6-67) by the Board of Parole on 6-20-68 and that parole, never having been revoked as prescribed by law, is still valid. Hence petitioner

was deprived of his liberty by the arbitrary actions of the Parole Board and the Respondent does not have valid reason for the illegal detention of petitioner.

The U.S. Supreme Court has ruled that any actions taken after an illegal act but in conjunction with the illegal act become illegal also. Since there was no valid revocation of parole as prescribed by law any actions that are incident to the revocation are null and void.

Any custom or useage of a state statute that denies due process or equal protection of the laws is in violation of the Federally guaranteed rights under the U.S. Constitution fourteenth amendment section one.

The custom or policy of the Parole Board of denying a person his right to due process does create an unequal protection of the laws and is in violation of the U.S. Constitution.

AUTHORITIES

Persons convicted of a felony may lose some rights and privileges of law abiding citizens, but do not lose all rights and the DUE PROCESS AND EQUAL PROTECTION clauses follow them to prison.

Jackson vs. Bishop D.C.Ark.1967 268 F.Supp.804

DUE PROCESS AND EQUAL PROTECTION of the laws are guaranteed not only to citizens but to all persons, including one who allegedly is not technically a "citizen" because of a conviction of a felony.

Gordon vs. Garrson D.C.Ill.1948 77 F.Supp.477

DUE PROCESS AND EQUAL PROTECTION of the laws of U.S.C.A. Const. Amend. Fourteen section one are guaranteed not only to citizens but to all persons.

Sellers vs. Johnson D.C.Iowa1946 69 F.Supp.778

CONCLUSION

For the above mentioned reasons, Petitioner respectfully submits to the Court, Petitioner believes that he was denied his rights as a person under the constitution of the U.S. and

prays the Court for relief from illegal confinement by the Respondent and a discharge from parole issued on 6-20-68.

Respectfully
s/ John J. Morrissey
29739 Box 316
Fort Madison, Iowa

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA
DAVENPORT DIVISION

JOHN J. MORRISSEY,
Petitioner,
vs.
LOU V. BREWER, Warden,
Respondent.

CIVIL No. 3-869-D
ORDER

[Filed, Mar 25 1970; R. E. Longstaff, *Clerk*, U.S. District Court Southern District of Iowa]

This matter is before the Court on the petition of John J. Morrissey, hereinafter referred to as petitioner, for a Writ of habeas corpus. Petitioner is currently an inmate of the Iowa State Penitentiary at Fort Madison, Iowa.

It appears from papers now on file with the Court that petitioner was originally sentenced to seven years confinement in the Iowa State Penitentiary by the Iowa District Court for Linn County on his plea of guilty to a charge of false drawing and uttering of checks in violation of Iowa Code § 713.3 (1962). Subsequent to his incarceration, petitioner was paroled from the institution. Thereafter, on January 31, 1969, he was arrested for parole violation and returned to the penitentiary. Thereupon, petitioner's original discharge date of August 6, 1970 was replaced on the prison records with a new discharge date of January 20, 1971.

Petitioner complains (1) of his arrest and return to prison without necessary judicial safeguards, (2) of the change in the date of his discharge without adequate authority therefor, and (3) because he was never prosecuted for a felony as provided by Iowa Code § 247.28.

The Court notes that the present state of the petition and other papers now on file is such that pertinent information relating to the case is not available to the Court. It would be helpful if the Court possessed authentic copies of the various documents now in possession of the state relating to the revocation of petitioner's parole. Also needed are copies of the papers filed in connection with

petitioner's state habeas corpus proceedings and a copy of any transcript of record made at any hearings had therein.

IT IS ORDERED that counsel for the respondent, within fifteen days of the date of this order, file with the Court authentic copies of all papers in possession of the state relating to the revocation of petitioner's parole.

IT IS FURTHER ORDERED that counsel for respondent, within fifteen days of the date of this order, file with the Court copies of all papers filed in connection with the petitioner's state habeas corpus proceedings and copies of any transcripts of testimony made at any hearings conducted therein.

Dated this 25th day of March, 1970.

/s/ Ron N. Stephen
CHIEF JUDGE

3-25-70 Copy mailed to Petitioner & Attorney General

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
DAVENPORT DIVISION

JOHN J. MORRISSEY,
Petitioner

vs.

LOU V. BREWER (Warden),
Respondent

CIVIL No. 3-869-D
Petition for amendment to original petition

[Filed, Apr. 1 1970, R. E. Longstaff, *Clerk*, U.S. District Court Southern District of Iowa]

Comes now the Petitioner in the above mentioned case, without benefit of counsel. It is the desire of the Petitioner to respectfully request of the Court permission to amend to the original Petition which is on file now in this Court.

In support of the Petitioners' allegation in his original Petition to the Court that he was denied DUE PROCESS OF LAW when he was imprisoned by the State Board of Parole and the Respondent following the Petitioners arrest for parole violation (247.28-1966 Iowa) on or about 1-31-69.

It is held by the United States Supreme Court; Because trial by jury in criminal cases is fundamental to the American scheme of justice, the fourteenth amendment guarantees the right of jury trial in all criminal cases which were they to be tried in federal court, would come under or within the Sixth Amendments guarantee. The right to jury trial in serious criminal cases is a fundamental right and hence must be recognized by states as part of their obligation to extend DUE PROCESS OF LAW to all persons within their jurisdiction.

The penalty authorized for a particular crime is of major relevance in determining whether it is serious or not and in it self shall subject trial of State criminal cases to mandates of Sixth Amendments jury trial provisions.

A crime punishable by two years in prison is a serious crime and not a petty offense, so that Sixth and Fourteenth Amendments require State to grant jury trials. (DUNCAN VS. STATE OF LA., 88 S Ct. 1444)

In view of the fact that the crime of parole violation in

the State of Iowa (247.28-1966 Iowa) is punishable by a greater penalty than the above mentioned case, Petitioners allegation of denial of DUE PROCESS in the instant case has been confirmed and upheld by the U.S. Supreme Court.

Respectfully submitted, on this date 3-30-1970
by Petitioner,
/s/ John J. Morrissey 29739

4-1-70 copy mailed to Atty. General.

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA
DAVENPORT DIVISION

JOHN J. MORRISSEY, *Petitioner.*	Civil No. 3-869-D
vs.	Requested Documents Concerning Petitioner's Parole Revocation and State Habeas Corpus Proceedings
LOU V. BREWER, Warden, *Respondent.*	

[Filed, Apr 10 1970, R. E. Longstaff, *Clerk*, U.S. District Court Southern District of Iowa]

COMES NOW the respondent, Lou V. Brewer, Warden, Iowa State Penitentiary, Fort Madison, Iowa, by his attorneys and hereby files the following documents and/or papers regarding the petitioner's parole revocation and his subsequent habeas corpus petition in the Lee County District Court of Iowa concerning the same.

Respectfully submitted,
RICHARD C. TURNER
Attorney General of Iowa

By Michael J. Laughlin
MICHAEL J. LAUGHLIN
Assistant Attorney General
State House, Des Moines, Iowa

Attorneys for Respondent

IN THE DISTRICT COURT OF IOWA
IN AND FOR LEE COUNTY

JOHN J. MORRISSEY, *Petitioner*,

vs.

LOU V. BREWER, Warden of Iowa State Penitentiary, *Respondent*.

Petition for a Writ of Habeas Corpus

[Filed, 1969 Jun 25 AM 9 22, District Court, Lee County, Iowa, Lyle B. Miller, *Clerk*]

Comes now John J. Morrissey 29739, petitioner above named, first being duly sworn upon oath, makes this application, praying for a Writ of Habeas Corpus, and does depose and state that:

1. I am unlawfully and illegally restrained of my liberty and confined within the Iowa State Penitentiary at Fort Madison, Iowa, in custody of the respondent herein.
2. That the cause or pretense for such a restraint and imprisonment to the best of my knowledge and belief is a "Mittimus" derived from the Judge of the Linn County District Court, Cedar Rapids, Iowa, entered the 5th day of January, 1967. (Mittimus attached)
3. I allege and state that such restraint is illegal, in violation of the 6th, 13th and 14th Amendments of the Constitution of the United States and of the State of Iowa.
4. I have never before submitted any kind of application to this or any other court in these United States for the relief sought herein.
5. And, that a copy of this petition has been mailed by U.S. Mails to the respective offices of the interested parties in this litigation.

HISTORY OF CASE

On the 5th day of January 1967, the petitioner was convicted on a plea of guilty for the violation of Section 713.3 of the 1962 Iowa Code.

On the same date, petitioner was sentenced for the aforesaid crime to a term of seven (7) years at the Iowa State Penitentiary, Fort Madison, Iowa.

On the 20th day of June, 1968 petitioner was granted a parole from the Iowa State Penitentiary and on the 31st day of January 1969 petitioner was arrested for parole violation and was returned to the Iowa State Penitentiary.

POINT 1

Petitioner contends that his constitutional rights that are accorded him by the United States Constitution and the Constitution of the State of Iowa have been and are now violated in view of the fact that he was deprived of a hearing with or without counsel at the times that he was arrested for the revocation of his parole. Petitioner contends that a hearing should have been held to determine whether his parole status was legally revoked according to law and not upon presumption and hearsay alone.

Petitioner contends that no hearing was held at the revocation proceedings with petitioner or his counsel being present, nor was petitioner advised of the said hearing, if held. Petitioner was not advised of his right to counsel at every stage of the proceedings.

Petitioner further contends that his constitutional rights were violated when he was arrested for violation of parole regulations, Section 247.28, 1962 Iowa Code, in that he was "deemed guilty of a felony" and yet was not formally arraigned, allowed to be represented by counsel or afforded "due process" in accordance with the United States Constitution and the Constitution of the State of Iowa.

AUTHORITIES

6th Amendment, U.S. Constitution
14th Amendment, U.S. Constitution
Gideon v. Wainright, 372 U.S. 335, 83 S.Ct. 72, 9 L. Ed. 2d 799, etc.
Pointer v. Texas, 85 s. Ct. 1065.
Mempha v. Rhay, 88 s. Ct. 254 (1967)
Article 1, Chapters 9 and 10, 1962 Iowa Code

ARGUMENT FOR POINT ONE

Petitioner was denied a revocation hearing and was denied counsel to represent him at said hearing that was conducted behind closed doors by the State Board of Parole. Memphia v. Rhay, Id., Gideon v. Wainright, Id.

Petitioner was also denied the right to confront his accusers of the alleged violation of his parole. Pointer v. Texas, Id.

PRAYER

Petitioner prays that this court sustain the petition herein and issue an Order to the Respondents herein directing that he immediately release petitioner from illegal confinement in the best interest of justice in view of the fact that rights to "due process" have been violated.

IN THE DISTRICT COURT OF THE STATE OF IOWA, IN AND FOR LEE COUNTY, AT FORT MADISON

JOHN J. MORRISSEY,
Petitioner,

vs:

LOU V. BREWER, Warden
Iowa State Penitentiary
Fort Madison, Iowa,
Respondent.

Civil Case No. 15212
Order

[Filed, 1969 Jun 26, District Court Lee County, Iowa
Lyle B. Miller, *Clerk*]

The petitioner's application for a writ of habeas corpus, filed herein on June 25th, 1969, has been submitted to the Court.

In his petition, the petitioner contends that his parole was revoked by the Board of Parole without a hearing and without appointment of counsel.

The Sixth Circuit Court of Appeals in the case of *Rose vs. Haskins* 388 F 2d 91, a 1968 case, reviewed the dismissal of a habeas corpus petition and held that one returned to imprisonment as a parole violator is not entitled to a hearing or a judicial review of the actions of the State Parole Board in revoking the petitioner's parole. The court found no merit in the contention of the petitioner that he was entitled to be confronted by his accusers, or that he was entitled to the appointment of legal counsel and to receive a trial by jury. To the same effect, see *Hutchinson vs. Patterson* 267 F Supp 433 (1967); *U.S. vs. Hartsell* 277 F Supp 933 (1967); *U.S. vs. Brierly* 288 F Supp 401 (1968); and *Petition of Du Bois* 445 P 2nd 354. See also the Iowa case of *Curtis vs. Bennett* 256 Iowa 1164; 131 N.W. 2d 1.

In several of these cases, the case of *Mempa vs. Rhay* 389 U.S. 128, decided by the United States Supreme Court in 1967, is distinguished, and it is noted that the Mempa case involved a procedure whereby sentencing was deferred for a period of time. This is not similar to the petitioner's case

as indicated in the petitioner's application for a writ of habeas corpus.

It is accordingly ordered that the petitioner's application for a writ of habeas corpus be, and the same is, hereby denied.

Dated this 26th day of June, A. D., 1969.

William S. Cahill
Judge of District Court
First Judicial District

IN THE DISTRICT COURT OF THE STATE OF IOWA, IN AND FOR LEE COUNTY, AT FORT MADISON

JOHN J. MORRISSEY,
Petitioner,

vs.

LOU V. BREWER, Warden
Iowa State Penitentiary
Fort Madison, Iowa,
Respondent.

Civil Case No. 15212
Order

[Filed, 1969 Aug 4, District Court Lee County, Iowa Lyle B. Miller, *Clerk*]

IT IS HEREBY ORDERED That Austin J. Rashid, Attorney at Law, Fort Madison, Iowa be and he is hereby appointed to assist the petitioner in the preparation of his appeal in the above matter.

Dated this 4th day of August, A.D., 1969.

J. R. Leary
Judge of District Court
First Judicial District

IN THE DISTRICT COURT OF THE STATE OF IOWA IN AND FOR THE LEE COUNTY AT FORT MADISON

JOHN J. MORRISSEY,
Petitioner,

vs.

LOU V. BREWER, Warden
Iowa State Penitentiary
Fort Madison, Iowa
Respondent.

Civil Case No. 15212
Notice of Appeal to Supreme Court.

[Filed, 1969 Aug 11; District Court Lee County, Iowa
Lyle B. Miller, *Clerk*]

TO: LOU V. BREWER, Defendant; and
LYLE B. MILLER, Clerk of said Court:

The above named Petitioner hereby appeals to the Supreme Court of Iowa from the Order entered herein on June 26, A.D., 1969 denying Petitioner's application for a Writ of Habeas Corpus. And you are notified that said appeal will be heard before said Supreme Court at the State House in Des Moines, Iowa, as provided by law and the rules of said Court.

Austin J. Rashid
AUSTIN J. RASHID
619-7th Street
Fort Madison, Iowa
Attorney for Petitioner.

CLERK'S CERTIFICATE

I hereby certify that the foregoing Notice of Appeal was filed in my office by Petitioner-Appellant on the 11th day of August, 1969 and the filing thereof noted in the proper docket; and that I did on the 11th day of August, 1969

mail or deliver a copy of said notice to each of the following named parties at the addresses noted below:

Box 316 Iowa State Penitentiary
Fort Madison, Iowa

Clerk Supreme Court

Attorney General's Office

Mr. John J. Morrissey 29739

Lyle B. Miller, Clerk of the District Court of Lee County, Iowa

By Mary Mc Murry
Deputy

STATE OF IOWA

THE STATE OF IOWA, *to the District Court of the County of and State aforesaid:*

WHEREAS, *There was certified to the SUPREME COURT of the State of Iowa, the record and proceedings in a certain cause which was in said District Court, the parties thereto being*

JOHN J. MORRISSEY

Plaintiff, and,

LOU V. BREWER, Warden

Defendant,

[Filed, 1969 Sep 18, District Court Lee County, Iowa
Lyle B. Miller, *Clerk*]

wherein there was an appeal from the order and judgment rendered in the District Court to the SUPREME COURT, and the said Court having duly examined the record and proceedings aforesaid, in the premises, at Des Moines, in said state, on 15th *day of* September, 1969, *did* DISMISS APPEAL.

THEREFORE, *You are hereby commanded that with diligence and according to law you proceed in the same manner as if no appeal had been taken and prosecuted in this COURT, anything in the record or proceedings aforesaid heretofore certified to the contrary notwithstanding.*

IN WITNESS WHEREOF, *I have hereunto set my hand and affixed the Seal of said COURT. Done at Des Moines this* 17th *day of* September *A. D.* 1969.

Helen M. Lyman
Clerk of Supreme Court

By

Deputy.

STATE OF IOWA

[Filed, 1969 Oct 3, District Court Lee County, Iowa
Lyle B. Miller, *Clerk*]

THE STATE OF IOWA, *to the District Court of the County of* LEE *and State aforesaid:*

WHEREAS, *There was certified to the SUPREME COURT of the State of Iowa, the record and proceedings in a certain cause which was in said District Court, the parties thereto being*

JOHN J. MORRISSEY

Plaintiff, and,

LOU V. BREWER, Warden
State Penitentiary, Fort Madison

Defendant,

wherein there was an appeal from the order and judgment rendered in the District Court of the SUPREME COURT; and the said Court having duly examined the record and proceedings aforesaid; in the premises, at Des Moines, in said state, on 25th *day of* July, 1969, *did DENY WRIT.*

THEREFORE, *You are hereby commanded that with diligence and according to law you proceed in the same manner as if no appeal had been taken and prosecuted in this COURT, anything in the record or proceedings aforesaid heretofore certified to the contrary notwithstanding.*

IN WITNESS WHEREOF, *I have hereunto set my hand and affixed the Seal of said COURT. Done at Des Moines this* 2nd *day of* October *A.D.* 1969

Helen M. Lyman
Clerk of Supreme Court

By .....
Deputy

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA
DAVENPORT DIVISION

JOHN J. MORRISSEY,
Petitioner,
vs.
LOU V. BREWER, Warden,
Respondent.

Civil No. 3-869-D
Requested Documents Concerning Petitioner's Parole Revocation

[Filed, Apr 9 1970, R. E. Longstaff, *Clerk*, U.S. District Court Southern District of Iowa]

COMES NOW the respondent, Lou V. Brewer, Warden, Iowa State Penitentiary, Fort Madison, Iowa, by his attorneys and hereby files the requested papers and/or documents pertaining to petitioner's parole revocation as requested by this court in its order dated March 25, 1970.

Respectfully submitted,
RICHARD C. TURNER
Attorney General of Iowa

By Michael J. Laughlin
MICHAEL J. LAUGHLIN
Assistant Attorney General
Attorneys for Respondent

STATE OF IOWA
DEPARTMENT OF SOCIAL SERVICES
BUREAU OF ADULT CORRECTION SERVICES

REPORT OF VIOLATION

[Filed, Jan 30 1969, Des Moines, Iowa, R. W. Bolzin, *Secretary*]

DATE: January 28, 1969

NAME: Morrissey, John J. INST. & NUMBER: FM# 29739

ADDRESS: 710 5th Ave. S. E. Cedar Rapids, Iowa

SENTENCE: 7 years c.c.
OFFENSE(S): False Checks, Larceny, Desertion.
DATE OF SENTENCE: January 5, 1967
UNEXPIRED TIME: 2 years and 2 months
DATE OF PAROLE (PROBATION): June 20, 1968

I. Rules Violated

#2 I will find a rooming place, which place will be approved by my parole agent on his first visit. I will immediately report any change of rooming place to the Chief Parole Officer, which shall be subject to approval by the parole agent on his next visit.

#6 I will in all respects conduct myself honestly, avoid questionable associates, obey the law, keep reasonable hours and shall avoid all places of questionable reputation and taverns. I will consult my parole agent before incurring indebtedness.

#9 I will neither own nor operate an airplane, automobile, truck, motorcycle or motorscooter without the written consent of the Chief Parole Officer.

II. I recommend that John J. Morrissey's parole be revoked.

III. Summary of above Violations

#2 Prior to John J. Morrissey's release from the Mental Health Institute at Independence, Iowa Alcoholic Unit. I sent a letter to that institution

instructing them that he could be released to come to Cedar Rapids, Iowa and that he was to obtain a rooming place first and then contact me immediately with his address. He was released on January 10, 1969 and brought to Cedar Rapids by one of the parties who work at Independence. Between January 10, and January 24, 1969 He made no effort to contact me and give me his address or tell me that he was in Cedar Rapids, Iowa. I learned that he had a room at 710 5th Ave. S.E. from him in the Linn county jail where he was being held on a parole violation, which I had a pickup placed with the Cedar Rapids, Iowa Police for. Reasons will be explained in following paragraphs.

III. Summary of Violations:

#6 At about 4:15 P.M. January 18, 1969 John J. Morrissey was driving a 1960 white over blue Chevrolet 57-26627(68) at 3rd Ave. and 6th St. S.E. Cedar Rapids, Iowa and backed into the left front fender of Squad Car #2 Official City B-10034 driven by Officer Serbousek doing about $53.50 damage to the car. Upon checking the ownership of the Chev. the Police learned that the car had been sold by the Ed. Naughton Auto Sales on January 18, 1969 to a person who said that he was Michael Joseph Connor of 619 I Ave. N.W. Cedar Rapids, Iowa. The police attempted to locate this Connor at that address and learned that people by the name of Countryman lived there. Also at the scene of the accident John gave the police his address as 204½ 1st St. N.W. Cedar Rapids, Iowa. Upon checking this address later. The police found that this is a vacant apartment. He also informed them that he was insured by Iowa National Mutual Co. with liability insurance. Upon checking with that insurance Co. the police found that they carried neither John Morrissey or Michael Joseph Connor's insurance.

The Captain of Traffic, Captain Overman, then called me on January 21, 1969 with the above information. I told him I did not know where

John was living, in fact I had not been informed that he was in town. I told the Capt. to put a pickup out on John and Place a parole hold on him for me.

I next called the Weyerhauser Co. where Morrissey was supposed to be employed. They informed me that he did work one day and that was January 13, 1969 and had not reported into work since and they had not received a phone call from him. They had no address on him.

Later I received a phone call from a Sam Becker, who owns and operates the Becker Furniture Co. He said that in November of 1968 a man came to his store and said that his name was D. Leo Morrissey of 223 2nd Ave. S.W. Cedar Rapids, Iowa. That he worked for the Post Office. He wanted to buy a bedroom set on credit. Mr. Becker checked the credit guide and learned that a D. Leo Morrissey did work for the post office and had an A-1 credit rating. So he sold this party a bedroom set for $250.00. This party picked up the bedroom set on November 29, 1968. He was with another man who drove a pickup truck. That is the last they saw this Mr. Morrissey. He wanted to know if I knew the Morrissey that lived at 223 2nd Ave. S.W. as the landlady had informed him that this man was on parole. I informed him that that man was John J. Morrissey.

#9 Mr. Morrissey did not have written permission to own or operate an automobile. He was informed that as long as we were aware that he was still using alcohol we would not give him permission to operate a car.

III. Parolee's Version of the Offenses.

He could give no explanation as to why he failed to contact me. He claimed to have been sick from January 13, 1969 to January 18, 1969 and that was the reason he did not go to work. He said that Dr. Barthel told him he did not have to call in to his employer to inform him he was sick. Just when he was released from the doc-

tor's care he would give him a note about his illness for the employer.

He admitted that he bought the 1960 Chev. from Ed Naughton and registered it in Michael J. Connor's name. He also admitted he did not know a Michael J. Connor. He also admitted being the driver of this same Chev. when it backed into the Squad Car.

He further admitted that he bought the furniture at the Becker Furniture store under the name of D. Leo Morrissey and that he signed an agreement in that name. He now does not remember where the bedroom set is. Claimed that he did not remember picking up the set and thought it was still in the store. When informed that Mr. Becker told me he picked the set up on November 29, 1968. He said he did not know where it was.

IV. Previous Violations

When released from Fort Madison, John was sent to ARP at Independence, Iowa. Upon his release he was taken to the Weyerhauser Co. where he obtained employment. This was about the first of August 1968. He worked there until the last week in November and then failed to show up to work. He started to drink vodka and was located on December 1, 1968 in a cemetary on highway #150 near the Midway. He was barefooted and had no hat or coat on. He was incoherent and of course near shock because it was snowing at that time. He was taken to Mercy Hospital by a Deputy Sheriff who found him and then to Independence MHI. being committed by the Mental Health Commission in Linn County.

His only other violation was operating a motor-vehicle which I found necessary to remind him he did not have written permission to do.

V. Parole History

His previous parole history is mentioned above. He had asked permission to marry Betty Chase with whom he was going. Then he got drunk

and went back to the ARP. Vocational Rehab had him enrolled in Area 10 but he only went one week.

VI. Conclusion:
Because of his continual violating of his parole rules I feel that he should be returned to Fort Madison.

VII. John is currently in the Linn County Jail on a Parole Violation.

c.c. Board Members
Mr. Linnenkamp
File

Sincerely
/s/ Harold L. Cerveny
HAROLD L. CERVENY

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
DAVENPORT DIVISION

JOHN J. MORRISSEY,
Petitioner,

vs.

LOU V. BREWER, Warden,
Respondent.

Civil No. 3-869-D
Order

[Filed, Apr. 15, 1970, R. E. Longstaff, *Clerk*, U.S. District Court Southern District of Iowa]

This matter is before the Court on the petition of John J. Morrissey, hereinafter referred to as petitioner, for a writ of habeas corpus. Petitioner is currently an inmate of the Iowa State Penitentiary at Fort Madison, Iowa.

It appears from papers now on file with the Court that petitioner was originally sentenced to seven years confinement in the Iowa State Penitentiary by the Iowa District Court for Linn County on his plea of guilty to a charge of false drawing and uttering of checks in violation of Iowa Code § 713.3 (1962). Subsequent to his incarceration, petitioner was paroled from the institution. Thereafter, on January 31, 1969, he was arrested for parole violation and returned to the penitentiary. Thereupon, petitioner's original discharge date of August 6, 1970 was replaced on the prison records with a new discharge date of January 20, 1971.

Petitioner complains (1) of his arrest and return to prison without necessary judicial safeguards, (2) of the change in the date of his discharge without adequate authority therefor, and (3) because he was never prosecuted for a felony as provided by Iowa Code § 247.28.

Consideration is first given to petitioner's allegations relative to his arrest and return to prison without hearing or appointment of counsel.

Under the Iowa Law, one returned to imprisonment as a parole violator is not entitled to a hearing or other judicial review of the actions of the State Parole Board in

revoking his parole. See *Curtis* v. *Bennett*, 256 Iowa 1164; 131 N.W.2d 1. The Iowa Law has been held sufficient for Federal Constitutional purposes. *Curtis* v. *Bennett*, 351 F.2d 931 (8th Cir. 1965). The case of *Mempa* v. *Rhay*, 389 U.S. 128 (1967) decided by the United States Supreme Court applies to situations involving a deferred sentence and does not apply under the facts presented here. See *Williams* v. *Patterson*, 389 F.2d 374 (10 Cir. 1968); *Rose* v. *Haskins*, 389 F.2d 91 (6th Cir. 1968). Petitioner's complaint in this regard is without merit.

Next, consideration is given to petitioner's allegation that he has never been prosecuted for a felony, as provided by Iowa Code § 247.28. It suffices to say for these purposes that this Court knows of no Federal Constitutional standard that would require a state to prosecute a parole violator as such simply because statutory provisions allow the same.

Lastly, the Court reaches petitioner's allegations concerning the change of his discharge date on the prison records.

The Court notes from the records of the Lee County Iowa District Court, copies of which have been furnished by counsel for respondent, that this issue has not been squarely put before the Iowa Courts for their consideration. Under such circumstances, this Court will not consider the matter. Petitioner must exhaust his state remedies. See 28 U.S.C. 2254.

ORDER

IT IS ORDERED that the petition of John J. Morrissey for a writ of habeas corpus, filed September 12, 1969, be and is hereby denied.

Dated this 15th day of April, 1970.

Roy L. Stephenson
Chief Judge

4-15-70 Copy mailed to Petitioner & Attorney General.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
DAVENPORT DIVISION

JOHN J. MORRISSEY,
Appellant,

vs.

LOU V. BREWER, Warden,
Respondent.

Notice of Appeal to Eight Circuit Court of Appeals

[Filed April 21, 1970, R. E. Longstaff *Clerk*, U. S. District Court Southern District of Iowa]

Comes now, the appellant, without assistance of counsel, and wishes to serve notice of appeal of an Order entered on the 15th day of April, 1970 in the United States District Court, Southern District, Davenport Division by the Honorable Judge Roy L. Stephenson in an habeas corpus action number 3-869-D.

The appellant sets forth the following parts of the above named judgement as the point in his appeal;

Page two (2) of an order issued by the Honorable Judge Stephenson, starting at line seventeen (17) to line twenty-two (22) inclusive.

As close as the appellant can tell this action should come under rule Twenty-two (22) of the rules of Civil Procedure for the above named Court.

Appellant would at this time request the Court for permission to proceed in this action in forma pauperis. Appellant would also request of the Court at this time to appoint counsel for the purpose of futhering this action.

With all due respect to the Court the appellant can't seem to agree with the Courts holding that there is no Federal Constitutional standard that would require a State to prosecute a felony charge after the State has deprived the person of his liberty because of that charge. To me the Constitution of the United States surely provides for exoneration at law. It would seem to me that when a person is deprived of his liberty without any provision to exonerate

himself that it is in direct conflict with the Constitutional Standards of Equal Protection of the laws. Just because a person is a parole violator does not exempt him from any of the protections of the Constitution. For the above mentioned reasons the appellant wishes to appeal the Order issued by the Court on 4-15-70, to the Eight Circuit Court of Appeals.

Respectfully submitted on this date 4-17-1970.

/s/ John J. Morrissey 29739
Appellant
Box 316—Fort Madison, Ia.

Subscribed and sworn to before me this date, April the seventeenth, 1970

Wm. F. Abel
My commission expires July 4, 1972.
Notary Public

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
DAVENPORT DIVISION

JOHN J. MORRISSEY, #29739, *Petitioner,* vs. LOU V. BREWER, Warden, *Respondent.*	Civil No. 3-869-D *ORDER*

[Filed, April 21, 1970, R. E. Longstaff, *Clerk*, U. S. District Court Southern District of Iowa]

This matter is before the Court on the application of John J. Morrissey for permission to appeal this Court's Order of April 15, 1970 in forma pauperis. The application is treated as an application for a certificate of probable cause pursuant to 28 U.S.C. § 2253.

The Court is of the opinion that any appeal from the determination of the issues herein is frivolous and futile.

IT IS ORDERED that the application of John J. Morrissey for the issuance of a certificate of probable cause to appeal be and is hereby denied.

Dated this 21st day of April, 1970.

Roy L. Stephenson
Chief Judge

4-21-70 Copy mailed to Petitioner & Attorney General.

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 20328 JOHN J. MORRISSEY, #29739, *Appellant*, vs. LOU V. BREWER, Warden, *Appellee*.	Appeal from the United States District Court for the Southern District of Iowa.

[Filed June 4, 1970, R. E. Longstaff, *Clerk*, U. S. District Court, Southern District of Iowa]

This cause comes before the Court on consideration of an application for certificate of probable cause. In connection with the application the Court has examined the original files of the United States District Court for the Southern District of Iowa in case No. 3-869-D Civil. Being fully advised in the premises it is now here ordered that the application for certificate of probable cause be, and it is hereby, granted. The Clerk of this Court is directed to regularly docket this appeal.

It is further ordered that Mr. W. Don Brittin of the Des Moines, Iowa Bar be, and he is hereby, appointed to represent appellant on this appeal. Appointed counsel for appellant may have forty days from today's date in which to serve and file five clearly legible typewritten copies of brief of appellant. One additional such copy of appellant's brief should be served on the Attorney General for the State of Iowa. Typewritten briefs are to be on letter-sized paper and fastened in the left margin.

June 3, 1970

6-4-70: Copy to Judge Stephenson
Copy to Attys Turner & Laughlin
Copy to Don Brittin

No. 3-897-D Civil

G. Donald Booher, #29509
Petitioner,

vs.

Lee and O'Brien Counties and the State of Iowa, et al,
Respondents.

20425
Davenport Division
Memorandum
Of Papers Filed, and Date of Filing

	Date	
1.	March 11, 1970	Petition for Writ of Habeas Corpus.
2.	March 11, 1970	Notice of Transfer from a Pretermitted Division.
3.	March 17, 1970	Order to Show Cause.
4.	March 20, 1970	Motion for an Enlargement of Time.
5.	March 20, 1970	Affidavit of Service.
6.	March 23, 1970	Order granting to April 7, 1970 to make return.
7.	April 7, 1970	Return.
8.	April 7, 1970	Memorandum in Support of Return.
9.	April 7, 1970	Affidavit of Service.
10.	April 13, 1970	Answer by Petitioner.
11.	May 1, 1970	Order directing counsel for respondent to file records.
12.	May 7, 1970	Certificate of Readiness, Application for Writ of Habeas Corpus and Order dated 2-26-70.
13.	May 7, 1970	Certificate—Petition filed 11-21-69 and Order dated 11-26-69. Application filed 12-22-69 Notice of Trover and Order dated 1-6-70.
14.	May 28, 1970	Memorandum & Order directing counsel for respondents to file within 10 days, various papers which are the subject of this memorandum & order.
15.	June 2, 1970	Letter with copies of records per order of 5-27-70.

16.	June 10, 1970	Order denying Petition for Writ of Habeas Corpus.
17.	June 16, 1970	Application for Certificate of Probable Cause.
18.	June 16, 1970	Order Denying Application for Certificate of Probable Cause.
19.	July 28, 1970	Copy of Order from CCA granting ptnr's. application for certificate of probable cause and appointing W. Don Brittin to represent ptnr. consolidating appeal with John J. Morrissey v. Brewer.
20.	April 22, 1971	Judgment affirming Order of District Court, by CCA. (attested copy)
21.	April 22, 1971	Attested copy of Opinion, CCA, affirming Order of District Court.

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA
EASTERN DIVISION

Case No. 2-478-E
(To be supplied by the Clerk of the District Court)

G. DONALD BOOHER, No. 29509
Full name and prison number (if any) of Petitioner
PRO SE

vs.

LEE AND O'BRIEN COUNTIES AND THE STATE OF IOWA, ET AL.
Name of Respondents

Title 18 U.S.C. Sections 241-242

Title 28 U.S.C. Sections 2241-2254

DEPRIVED OF EQUAL PROTECTION OF STATE-FEDERAL LAWS IN THE STATE AND FEDERAL CONSTITUTIONS BY A GENERAL-WARRANT.

[Filed March 11, 1970, R. E. Longstaff *Clerk*, U.S. District Court Southern District of Iowa]

PETITION FOR WRIT OF HABEAS CORPUS
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA

PERSONS IN STATE CUSTODY

IOWA STAT. 247. 12 (Parole Time not counted). STOPS AND STARTS, REVERSES, CRIMINAL PENALTIES OF PUNISHMENT OF THE SENTENCING COURTS. IOWA STAT. 247. 9 (Legal custody of paroled prisoners).

STRIPS PERSONS ON PAROLE FROM ALL OF THE PENITENTIARIES IN IOWA, OF ALL OF THEIR VESTED CIVIL AND CONSTITUTIONAL RIGHTS OUTLINED IN AND GUARANTEED THEM IN THE LAWS OF THE STATE AND FEDERAL CONSTITUTIONS, SOLEY BECAUSE, IOWA PAROLE LAWS ALLOWS STATE APPOINTED OFFICIALS TO USE PAROLE CONTRACTS SIGNED BY PRISONERS BEFORE THEY ARE RELEASED ON PAROLE AS, GENERAL WARRANTS: WHICH DO UNLAWFULLY DEPRIVE ALL PAROLEES OF A HEARING AND THE DEFENSE OF LEGAL COUNSEL, AT ALL TIMES A STATE PRISONER IS ON PAROLE IN OR OUT OF THE STATE IOWA.

"FORBIDS GENERAL WARRANTS FOR ARREST" FOURTH AMENDMENT CONSTITUTIONAL PROVISION, WEST V. CAMBEL, 153 U.S. 78:

WILLIAMS V. STEELE, 194 F.2d 32 (8th Cir. 1952) the court said, " the function of habeas corpus is not to correct a practise, but only to ascertain whether the procedure complained of has resulted in an unlawful detention," BOWEN V. JOHNSTON, 306 U.S. 19, 24 (1959). Pertinently the Federal Habeas Corpus Statute Applies To Prisoners "in custody in violation of the Constitution or of a Law or Treaty of The United States. . . ." Title 28 U.S.C. Section 2241 (Supp. III 1950). Judge Learned Hand would, in addition, permit the writ "whenever else resort to it is necessary to prevent a complete miscarriage of justice."

Congress may pass laws "necessary and proper" to carry out legislative functions vested in it by Article I. U.S. CONST. art. I Section 8 cl. 18. The power to investigate is a necessary concomitant of its legislative function. McGrain v. Daughherty, 273 U.S. 135 (1927). When Congress in the legitimate exercise of its powers enacts "the supreme law of the land", state courts are bound by such law even though it effects their rules of practice. U.S. Const. art. VI cl. 2, as construed in Adams v. Maryland, 347 U.S. 179 (1949).

Sanford, Evidentiary Privileges Against The Product of Data Within The Control of Executive Departments, 3 VAND. L. REV. 73, 77 (1949) and Comment, an Informers Tale: Its Use in Judicial and Administrative Proceedings, 63 Yale L.J. 206, 212-13 (1953). The Sixth Amendment guarantees the accused's right to be confronted with the witnesses against him and reserves to him the right of cross-examination. Moreover, the Fifth Amendment restricts the national government from depriving any person of his due process rights while the Fourteenth Amendment protects any person from state interference with these rights.

And Therefore-above-said mandate is interfered with by Iowa Stat. 247.9 and Stat. 247.12: as outlined on page one aforesaid.

Instructions—Read Carefully

In order for this petition to receive consideration by the District Court, it shall be in writing (legibly handwritten or typewritten), signed by the petitioner and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, petitioner may finish his answer to a particular question on the reverse side of the page or on an additional blank page. Petitioner shall make it clear to which question any such continued answer refers.

Since every petition for habeas corpus must be sworn to under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Petitioners should therefore exercise care to ascertain that all answers are true and correct.

If the petition is taken *in forma pauperis*, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that petitioner will be unable to pay the fees and costs of the habeas corpus proceedings. When the petition is completed, *the original and two copies* shall be mailed to the Clerk of the District Court for the Southern District of Iowa, at Des Moines, Iowa.

If petitioner desires to have a filed copy returned to him, he shall request an additional set of forms and submit same with the original and required two copies.

1. Place of detention. Iowa Penitentiary, Fort Madison, Iowa
2. Name and location of court which imposed sentence. Iowa District Court at Primghar, Iowa
3. The indictment number or numbers (if known) upon which and the offense or offenses for which sentence was imposed:
   (a) # 1564
   (b) Forgery
   (c) Iowa Stat. 718.1
4. The date upon which sentence was imposed and the terms of the sentence:
   (a) 29th day of April, A.D. 1966
   (b) A term not to exceed TEN years
   (c) under Iowa Stat. 718.1.
5. Check whether a finding of guilty was made
   (a) after a plea of guilty Yes
   (b) after a plea of not guilty .....
   (c) after a plea of nolo contendere .....
6. If you were found guilty after a plea of not guilty, check whether that finding was made by
   (a) a jury .....
   (b) a judge without a jury Yes
7. Did you appeal from the judgment of conviction or the imposition of sentence? No
8. If you answered "yes" to (7), list
   (a) the name of each court to which you appealed:
      i. .....
      ii. .....
      iii. .....
   (b) the result in each such court to which you appealed:
      i. .....
      ii. .....
      iii. .....
   (c) the date of each such result:
      i. .....
      ii. .....
      iii. .....
   (d) if known, citations of any written opinion or orders entered pursuant to such results:
      i. .....
      ii. .....
      iii. .....

9. If you answered "no" to (7), state your reasons for not so appealing:
   (a) I am a poor person and cannot afford counsel,
   (b) and didn't have the money with which to obtain a copy of the proceedings of the court action upon the record nor a transcript of the trial court's proceedings.
   (c) .....

10. Prior to this Petition have you filed with respect to this conviction
   (a) any petitions in State or Federal Courts for habeas corpus? STATE COURTS YES
   (b) any petitions in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? NO
   (c) any other petitions, motions or applications in this or any other court? YES STATE COURTS

11. If you answered "yes" to any part of (10), list with respect to each petition, motion or application
   (a) the specific nature thereof:
      i. Petition for writ of habeas corpus
         Petition for writ of habeas corpus (two)
      ii. Refiled no docket number no hearing
         Petition for writ of equity sent back
      iii. Petition for writ of mandamus and injunction
         Petition for writ of mandamus
      iv. Notice of default
         Motion to vacate judgment
   (b) the name and location of the court in which each was filed:
      i. Lee County District Court, Fort Madison, Ia.
         Lee County District Court, Fort Madison, Ia.
      ii. Lee County District Court, Fort Madison, Ia.
         Lee County District Court, Fort Madison, Ia.
      iii. Supreme Court of Iowa, Des Moines, Iowa
         O'Brien County District Court, Primghar, Ia.
      iv. O'Brien County District Court, Primghar, Ia.
         O'Brien County District Court, Primghar, Ia.
   (c) the disposition thereof:
      i. Denied, after being deprived counsel
         Denied, after being deprived counsel twic.
      ii. Refiled no docket number no hearing
         Never docketed nor heard, as equity

iii. Filed no docket number sent back no hearing
Never docketed no docket number
iv. No docket number no hearing
Denied

(d) the date of each such disposition:
i. 25th day of February, A.D. 1970
21st day of November, A.D. 1969: 1/6/70:
ii. 9th day of Jan. 1970.
16th day of Dec. 1969.
iii. Filed the 12th day of Jan. 1970, sent back no #.
No hearing. Filed 23rd day of Jan. 1970
iv. 16th day of Feb. 1970.
30th day of Dec. 1969.

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:
i. Denied without hearing 2/26/70
Denied without hearing 11/26/69.
ii. Denied no hearing 1/6/70.
Denied no hearing " " "
iii. No opinion no hearing
No opinion no hearing
iv. No opinion no hearing
1/7/70 denied.

12. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

(a) False arrest-False Imprisonment until parole was revoked, after illegal search without no process. in O'Brien County, Iowa. Parole revokation is based upon Collusion-Iowa-Stat. 610.15-Stat. 666.5; and Stat. 704.3-Stat. 740.6, and the conspiracy of the O'Brien County Sheriff's Dept; onto the Lee County District Court, Fort Madison, Iowa (1969).

(b) Sentence to imprisonment is fraudulently based upon ex post facto operation of Iowa Stat. 718.1.

(c) Should the above-named Honorable Court cause its Subpeona of Duces Tecum to be issued directing that O'Brien County District Court and Lee County District Court, at Primghar, Iowa and Fort Madison, Iowa Case No. 15451—Lee County; and Case No. 1564—O'Brien County District Court clerks turn over all their case records Petitions, Affidavits, Motions, filed under said case numbers, as proof and evidence in good faith; herein.

13. State concisely and in the same order the facts which support each of the grounds set out in (12):
    (a) unlawful search, false arrest and false imprisonment and held incommunicado in O'Brien County Jail until parole was revoked under total censorship of all civil and constitutional rights.
    (b) Par. 5. is the only clause that can charge a crime or criminal offense in the text Iowa Stat. 718.1, the State of Iowa ex post factoly uses the entire nine degrees of different testimony of several newer and different criminal offenses as one continuous crime all at the same time without no notice as one Charge of Forgery, and thus, sentences the same as one crime under one penalty of punishment.
    (c) The case records, Petitions, Affidavits, Motions, shall prove that the Petitioner-herein, was falsely arrested and falsely imprisoned while on parole, and held in the said O'Brien county jail without probable cause under total-incommunicado for several days, deprived of sending in his parole report, thus, in order to get his parole revoked, by the O'Brien county Attorney and Sheriff not allowing the Petitioner no civil right, until after the State of Iowa Parole-Board-Ordered said parole revoked.
14. Has any ground set forth in (12) been previously presented to this or any other court, (*state*) or federal, in any petition, motion or application which you have filed? Yes
15. If you answered "yes" to (14), identify
    (a) which grounds have been previously presented:
        i. Supreme Court of Iowa
            (a) (b) Lee County District Court
        ii. (a) O'Brien County District Court
        iii. (a) The Governor of the State of Iowa
    (b) the proceedings in which each ground was raised:
        i. (a) all of the actions set out in (11) above.
        ii. (b) The Habeas Corpus dated 2/25/70, filed on the 25th, denied without a hearing on 2/26/70
        iii. under a four dollars filing fee. A copy is affixed hereto.
16. If any ground set forth in (12) has not previously been presented to any court, state or federal, set forth the

ground and state concisely the reasons why such ground has not previously been presented:

(a) .....

(b) .....

(c) .....

17. Were you represented by an attorney at any time during the course of

(a) your arraignment and plea? Court Appointed Yes

(b) your trial, if any? same as above

(c) your sentencing? same as above

(d) your appeal, if any, from the judgment of conviction or the imposition of sentence? Court would appoint an attorney for an appeal.

(e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? no

18. If you answered "yes" to one or more parts of (17), list

(a) the name and address of each attorney who represented you:

i. H. H. Schultz, Primghar, Iowa.

ii. .....

iii. .....

(b) the proceedings at which each such attorney represented you:

i. Trial Court Proceedings Only.

ii. .....

iii. .....

I understand that a false statement or answer to any of the questions contained in this pleading will subject me to penalties for perjury.

/s/ George Donald Booker
Signature of Petitioner

SUBSCRIBED and SWORN to
before me this 10th day of
March, 1970.

/s/ Wm. F. Abel
Notary Public
My commission expires
July 4, 1972

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA EASTERN DIVISION

G. DONALD BOOHER, # 29509 *Petitioner,* vs. LEE AND O'BRIEN COUNTIES AND THE STATE OF IOWA, *et al*, *Respondents.*	Civil No. 2-478-E Notice of Transfer of This Cause from a Pretermitted Division

[Filed, March 11, 1970, R. E. Longstaff, *Clerk*; U.S. District Court, Southern District of Iowa]

* * * *

Pursuant to the provisions of subsisting Order of Pretermission and Rule No. 2, Local Rules of the United States District Court, Southern District of Iowa, this cause is transferred from the Eastern Division to the Davenport Division of this District, and is now docketed and identified under Civil Number 3-897-D.

Henceforth, all documents presented to the Court and all record entries made by the Court in this cause shall bear in the caption the Civil Number last above written.

Dated this 11th day of March, 1970.

/s/ R. E. Longstaff
R. E. LONGSTAFF
Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA

G. DONALD BOOHER, # 29509,
Petitioner,

vs.

LEE AND O'BRIEN COUNTIES AND THE STATE OF IOWA, *et al.*,
Respondents.

Civil No. 3-897-D
Order to Show Cause

[Filed, March 17, 1970, R. E. Longstaff, *Clerk,* U.S. District Court, Southern District of Iowa]

This matter is before the court upon the Petition for Writ of Habeas Corpus, filed on March 11, 1970, and the court having examined said Petition and being duly advised in the premises, it appears that the respondent, Lou V. Brewer, Warden, Iowa State Penitentiary, Fort Madison, Iowa, has custody of the Petitioner.

IT IS THEREFORE ORDERED

1. Lou V. Brewer, Warden, Iowa State Penitentiary, respondent, is ordered and directed to show cause why a Writ of Habeas Corpus should not be granted, and said respondent shall make return certifying the true cause of the detention of Petitioner within three days after service of this Order upon him.

2. The Clerk of the United States District Court, Southern District of Iowa, shall forthwith serve this Order upon the respondent by certified mail.

DATED: March 17, 1970.

/s/ Roy L. Stephenson
ROY L. STEPHENSON
Chief Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
DAVENPORT DIVISION

G. DONALD BOOHER, *Petitioner,* vs. LEE AND O'BRIEN COUNTIES AND THE STATE OF IOWA, *et al.*, *Respondents.*	Civil No. 3-897-D Return

[Filed, April 7, 1970, R. E. Longstaff, *Clerk*, U.S. District Court, Southern District of Iowa]

COMES NOW, the respondent, Lou V. Brewer, Warden, Iowa State Penitentiary, Fort Madison, Iowa, by his attorneys and makes Return to the Order to Show Cause issued herein as follows:

1. That the petitioner, G. Donald Booher, is presently detained under authority of a mittimus issued from the District Court of Iowa, O'Brien County. On April 15, 1966, petitioner plead guilty to the crime of Forgery in violation of Section 718.1, Code of Iowa 1962; was paroled on November 14, 1968; and recommitted to the Iowa State Penitentiary, Fort Madison, Iowa, on or about September 24, 1969, subsequent to revocation of parole as provided by Section 247.9, Code of Iowa 1966.

2. That the petition for writ of habeas corpus filed herein is insufficient and a writ of habeas corpus should not issue for the reasons set forth in the Memorandum in Support attached hereto.

RICHARD C. TURNER
Attorney General of Iowa

By James W. Hughes
JAMES W. HUGHES
Assistant Attorney General

ATTORNEYS FOR RESPONDENTS

CERTIFICATION

It is hereby certified by the undersigned that the cause of detention of the petitioner set forth in Paragraph 1 of the appended Return is true and correct.

RICHARD C. TURNER
Attorney General of Iowa

By James W. Hughes
JAMES W. HUGHES
Assistant Attorney General
State House, Des Moines, Iowa

ATTORNEYS FOR RESPONDENTS

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
DAVENPORT DIVISION

G. DONALD BOOHER, *Petitioner*, vs. LEE AND O'BRIEN COUNTIES AND THE STATE OF IOWA, *et al.*, *Respondents*.	Civil No. 3-897-D Memorandum in Support of Return

[Filed, April 7, 1970, R. E. Longstaff, *Clerk*, U.S. District Court, Southern District of Iowa]

STATEMENT OF THE CASE

On April 15, 1966, the petitioner entered a plea of guilty in the District Court of Iowa, O'Brien County, to the charge of Forgery in violation of Section 718.1, Code of Iowa 1962. Petitioner was sentenced to a term not to exceed ten (10) years in the Iowa State Penitentiary, Fort Madison, Iowa, on April 29, 1966, and mittimus issued. The petitioner failed to appeal the O'Brien County District Court's final judgment to the Supreme Court of Iowa. On November 14, 1968, the petitioner was granted a parole. Petitioner was recommitted to the Iowa State Penitentiary on September 24, 1969, subsequent to revocation of said parole. Petitioner's application for a writ of habeas corpus filed in the District Court of Iowa, Lee County, on November 21, 1969, was denied on November 26, 1969. Petitioner's application for a writ of habeas corpus filed in the District Court of Lee County, Iowa, on February 25, 1970, was denied on February 26, 1970. The records of the Iowa Supreme Court indicate that petitioner failed to appeal to the Iowa Supreme Court the denial of those applications by the Lee County District Court. Several spurious documents which the petitioner denotes as Writ of Equity, Writ of Mandamus, Writ of Mandamus and Injunction, Notice of Default, and Motion to Vacate Judgment were summarily dismissed by the courts to which they were addressed ostensibly for the reason that they were and are nonexistent or inappropriate remedies.

ARGUMENT

Petitioner's petition should be denied for the reason that he fails to join the proper respondent, to wit: Lou V. Brewer, Warden, Iowa State Penitentiary, in whose lawful custody petitioner is detained. Furthermore, petitioner has failed to affirmatively show that he has unsuccessfully exhausted state remedies, a condition precedent to application for a writ of habeas corpus in federal court.

Petitioner alleges that immediately before revocation of his parole he was the victim of unlawful search, false arrest, and false imprisonment. These activities, if they did occur, are irrelevant and immaterial to the legality of petitioner's detention for the reason that they don't relate to the administrative revocation of petitioner's parole. Petitioner fails to aver any irregularity in the administrative revocation of parole as provided by Section 247.9, Code of Iowa 1966 or any misapplication of that Section by the Board of Parole.

Petitioner does attack the legality of his detention by asserting that he was denied due process of law for the reason that said revocation of parole was without a hearing and not subject to judicial review. There is no merit in petitioner's contention that he was denied due process concerning the revocation of his parole. An individual recommitted to prison subsequent to administrative revocation of parole is not entitled to a hearing or a judicial review of the actions of the State Parole Board in revoking the petitioner's parole.

In the leading case of *Curtis* v. *Bennett*, 256 Iowa 1164, 131 N.W.2d 1, the Iowa Supreme Court stated the applicable law in this type of situation (256 Iowa at 1167):

> "Iowa is among the majority of states which have consistently held that under statutes relating to revocation of probation or suspension of sentence which contain no express provision for notice and hearing, such a revocation without notice and hearing does not constitute a denial of due process."

In *State* v. *Rath*, 258 Iowa 568, 139 N.W.2d 468, and *Cole* v. *Holliday*, —— Iowa ——, 171 N.W.2d 603, the Iowa Supreme Court again examined and reaffirmed its previous decisions to the effect that a parolee has no rights in connection with the revocation of his parole or probation.

The Federal Courts have also been in agreement with the Iowa rule and have held that a parolee has no constitutional right to notice and a hearing on the question of revoking his probation or parole. See *Rose* v. *Haskins*, 388 F.2d 91; *Curtis* v. *Bennett*, 351 F.2d 931; *Hutchinson* v. *Patterson*, 267 F. Supp. 433; *United States* v. *Hartsell*, 277 F. Supp. 933.

CONCLUSION

For all the above reasons, respondent respectfully submits that the petition for writ of habeas corpus should be denied.

Respectfully submitted,
RICHARD C. TURNER
Attorney General of Iowa

By James W. Hughes
JAMES W. HUGHES
Assistant Attorney General

ATTORNEYS FOR RESPONDENTS

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
DAVENPORT DIVISION

G. DONALD BOOHER,
Petitioner,

vs.

LEE AND O'BRIEN COUNTIES AND THE STATE OF IOWA, *et al.*,
Respondents.

Civil No. 3-897-D
Answer

[Filed, April 13, 1970, R. E. Longstaff, *Clerk*, U.S. District Court, Southern District of Iowa]

COMES NOW, The Petitioner, in his answer to the respondents attorney, and says that their MEMORANDUM IN SUPPORT OF RETURN is no more than a SHAM-REPLY for lack of the truth of the manner in which State Courts of Record Of Iowa, REFUSE and DENY THE FEDERAL WRIT OF HABEAS CORPUS WITHOUT AN EVIDENTIARY HEARING AS WELL AS THE PETITIONER'S RIGHT TO BE REPRESENTED BY COUNSEL WHEN THE PRISONER IS INDIGENT AND CANNOT AFFORD TO HIRE COUNSEL.

Petitioner Filed his application for the Writ of Habeas Corpus IN THE UNITED STATES DISTRICT COURT WITH AN AFFIDAVIT REQUESTING THE ASSISTANCE OF COUNSEL, THE COURT GAVE THE RESPONDENT'S ATTORNEY AND EXTENSION OF TIME WITHOUT THE PETITIONER BEING APPOINTED COUNSEL IN ORDER THAT THE PETITIONER COULD OBJECT, TO THE EXTENSION OF TIME AND MAKE THE RESPONDENT'S ATTORNEY SHOW LEGAL CAUSE, WHY THE RESPONDENT'S ATTORNEY OBJECTS TO THE APPLICATION FOR THE WRIT UNDER (TITLE 18 U.S.C. SECTION 242 (1948)) which allows prisoners to bring an action against any person who willfully under color of state law, deprives him of his constitutional rights. While in such an action the prisoner need not first exhaust his state remedies, CHAPTER 740 STATUTE 3 OPPRESSION IN OFFI-

CIAL CAPACITY. If any judge, or other officer, by color of his office, willfully and maliciously oppress any person under pretense of acting in his official capacity, he shall be fined not exceeding one thousand dollars, and imprisoned in the county jail not more than one year, and be liable to the injured party for any damage sustained by him in consequence thereof. Of Iowa (1962-1966) thus, clears the way for the Writ to be had under a full and complete EVIDENTIARY HEARING on its merits—and injunctive relief is in order because of the deprivation of the function of the COMMON-LAW within the statutes of Iowa.

STATE OF IOWA }
COUNTY OF LEE } ss:

G. DONALD BOOHER
Petitioner

Subscribed and sworn to before me on the 10th day of April, A.D. 1970, WM. F. ABEL, Notary Public. My commission expires on the 4th day of July 1972: IN THE IOWA STATE PENITENTIARY, P.O. BOX 316, FORT MADISON, IOWA 52627

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
DAVENPORT DIVISION

G. DONALD BOOHER, *Petitioner,* vs. LEE AND O'BRIEN COUNTIES AND THE STATE OF IOWA, *et al.*, *Respondents.*	Civil No. 3-897-D Order

[Filed, May 1, 1970, R. E. Longstaff, *Clerk,* U.S. District Court, Southern District of Iowa]

This matter is before the Court on the petition of G. Donald Booher for a writ of habeas corpus.

It is evident from papers now on file with the Court in this case that petitioner has filed several actions relating to his detention in the Courts of the State of Iowa. The information on file relating to these various actions is not sufficient for this Court's purposes.

IT IS ORDERED that counsel for respondent file, within ten days of the date of this order, copies of all pleadings, transcripts of record and other papers associated with the various actions brought by this petitioner in the Courts of the State of Iowa in connection with his present detention.

Dated this 30th day of April, 1970.

ROY L. STEPHENSON
Chief Judge

5-1-70 Copy mailed to Petitioner & Attorney General.

IN THE DISTRICT COURT OF THE STATE OF IOWA
IN AND FOR LEE COUNTY AT FORT MADISON

GEORGE DONALD BOOHER, *Plaintiff*, vs. STATE OF IOWA, LOU V. BREWER, Warden, Iowa State Penitentiary, *Defendant*.	No. 15370 Order

[Filed, Nov. 26, 1969, 4:33 PM, District Court, Lee County, Iowa Lyle B. Miller, *Clerk*]

This matter comes before the Court upon a petition for writ of habeas corpus filed November 21st, 1969.

The Court has examined the petition and it appears to the Court that the principal complaint is that the petitioner had a parole revoked without a hearing. The Court finds that there is no requirement in Iowa that a hearing be held to revoke a parole.

IT IS THEREFORE HEREBY ORDERED That the petition for writ of habeas corpus is denied.

Dated this 26th day of November, A.D., 1969.

s Illegible
Judge of District Court
First Judicial District

IN THE DISTRICT COURT OF THE STATE OF IOWA,
IN AND FOR LEE COUNTY, AT FORT MADISON

GEORGE DONALD BOOHER,
Plaintiff,

vs

STATE OF IOWA,
LOU V. BREWER, Warden
Iowa State Penitentiary
Fort Madison, Iowa
Respondents.

Civil Case No. 15370
Order

The plaintiff filed a petition for writ of habeas corpus on November 21st, 1969, which was denied on November 26th, 1969 without hearing. The petitioner has filed an additional petition for habeas corpus alleging no grounds that did not exist on the 21st day of November, 1969.

First, habeas corpus cannot be brought piecemeal. See: Simonton vs. Huiskamp, 256 Iowa 279. Secondly, if the plaintiff was dissatisfied with the Court's ruling of November 26th, 1969, his remedy is by appeal and not by additional habeas corpus petition.

The plaintiff's present petition is therefore denied.

Dated this 6th day of January, A.D., 1970.

J. R. LEARY
Judge of District Court
First Judicial District

IN THE DISTRICT COURT OF THE STATE OF IOWA, IN AND FOR LEE COUNTY, AT FORT MADISON

G. Donald Booher, *Petitioner,* vs The State of Iowa, *Respondent.*	No. 15451 Order

[Filed Feb. 26, 1970, 3:22 PM, District Court, Lee County, Iowa, Lyle B. Miller, *Clerk*]

This is the third time the petitioner has made application to this Court. The first time was on November 21, 1969, which petition for Writ of Habeas Corpus was denied by this Court. The second time was on December 22, 1969, which application was denied by this Court on the 6th day of January, 1970.

The first application was denied because petitioner was complaining about not having a hearing for parole violation. Since no hearing is required, the petition was denied. The second petition was denied because habeas corpus cannot be brought piece meal: With reference to the present petition, it is difficult to know exactly what the petitioner is complaining about; but in any event, the ground of his complaint existed at the time that his original petition was presented to this Court and should have been presented at that time. This petition is also denied because habeas corpus cannot be brought piece meal.

Dated and signed this 26th day of February, A.D., 1970.

/s/ J. R. Leary
Judge of District Court
First Judicial District

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
DAVENPORT DIVISION

G. DONALD BOOHER, #29509
Petitioner,

vs.

LEE AND O'BRIEN COUNTIES AND THE STATE OF IOWA, *et al.*,
Respondents.

Civil No. 3-897-D
Memorandum and Order

[Filed, May 28, 1970, R. E. Longstaff, *Clerk*, U.S. District Court, Southern District of Iowa]

This matter is before the Court on the petition of G. Donald Booher for a writ of habeas corpus.

On April 30, 1970, this Court entered an order requesting that counsel for respondents file copies of various papers in connection with the case. On May 7, 1970, counsel for respondents filed said papers, as requested. However, the Court notes that papers relating to petitioner's parole and the subsequent revocation thereof are not included in the record as it now stands.

The Court requests that counsel for respondents file genuine copies of all existing papers related to the revocation of parole giving rise to this litigation, including a copy of the parole agreement under which petitioner was released on parole.

IT IS ORDERED that counsel for respondents be and are hereby directed to file, within ten days of the date of this order, the various papers which are the subject of this memorandum and order.

Dated this 27th day of May, 1970.

5-28-70 copies mailed to Petitioner & Atty. General.

Roy L. Stephenson
ROY L. STEPHENSON, *Chief Judge*
U. S. District Court
Southern District of Iowa.

PAROLE AGREEMENT

I, ... *No.* .....
in consideration of being placed on parole by the Board of Parole of the State of Iowa, do hereby agree that I will lead an honorable life and that I will obey the laws of the State of Iowa, and that I will abide by the rules and regulations that the Board of Parole and the Director, Adult Correction Services prescribe and that I will faithfully and honestly, to the best of my ability, follow and carry out the following terms and conditions during the term of my parole, to-wit:

1. I will proceed at once to the place of employment with .....

2. As soon as possible after reaching my destination, I will report to ..... show him my parole and at once enter upon the employment provided for me. I shall also report by mail my arrival at destination. I will find a rooming place, which place shall be approved by the agent of the Bureau of Adult Correction Services on his first visit. I will immediately report any change of rooming place to the Chief Parole Officer which shall be subject to approval of the parole agent on his next visit.

3. I will remain in such employment and under such supervision unless I have the written consent of the Chief Parole Officer to change therefrom. I agree to keep myself gainfully employed during my parole period.

4. I will not go beyond the territorial limits of ..... WITHOUT THE WRITTEN CONSENT OF THE Chief Parole Officer.

5. I will on the first week of each month until my final discharge, forward by mail to the Chief Parole Officer, Bureau of Adult Correction Services, State House, Des Moines, Iowa, a true report of my activities as required, and said report will be signed by my employer and/or supervisor.

6. I will in all respects conduct my self honestly, avoid questionable associates, obey the law, keep reasonable hours and shall avoid all places of questionable reputation, and taverns. I will consult my parole agent before incurring indebtedness.

7. (a) I will agree to completely abstain from the use of beer or intoxicating liquor and drugs.

(b) I will refrain from the excessive use of intoxicating liquor or beer.

(c) I will agree to attend an AA Meeting at least once a week.

8. I will not marry without written consent of the Chief Parole Officer.

9. I will neither own nor operate an airplane, automobile, truck, motorcycle or motor scooter without the written consent of the Chief Parole Officer.

10. I will not carry, own, possess, or use a firearm or weapon of any kind while on parole.

11. I further agree not to open or use a checking account with any bank while on parole without the written consent of the Chief Parole Officer.

12. Until I receive my final discharge, I understand that I am in the custody of the Warden of the..... and under the control of the Bureau of Adult Correction Services and I further understand and agree that I am subject to be taken into custody and returned to the ..... for any reason that shall be determined sufficient to the Board of Parole.

13. I further expressly agree and consent that should I leave the State of Iowa and should be arrested in another state that I do hereby waive extradition to the State of Iowa from any state where I may be found and also agree that I will not contest any effort by any jurisdiction to return me to the State of Iowa.

14. I understand and agree that this agreement shall be in full force and effect until I receive my final discharge.

I have carefully read and do clearly understand the provisions and conditions of my parole and I do hereby agree to abide by the rules and regulations of said parole as herein above set forth and I do hereby accept all of said terms and conditions of my said parole.

Dated this ..... day of ..... 19.....

....

INMATE

.....

WITNESSES

I understand that should I violate my parole by leaving my prescribed territory and am apprehended outside the state of Iowa as a fugitive that upon return I will be subject to criminal prosecution in accordance with Section 745.3 of the 1962 Code of Iowa which provides for an additional sentence of not to exceed five years to commence after the expiration of my previous sentence.

.....

SIGNATURE

Witness .....

CP-37263

No. ----------

Name ----------

Reg. No. ----- ----------

Date of Parole ----------

WARDEN'S RETURN

TO THE BOARD OF PAROLE

Sirs:

This Parole came into my hands

---

and by virtue thereof and subject to the conditions therein imposed, I permitted the within named

---

to go outside the enclosure of this institution ----------, at the hours of ----------M. this ---------- day of

---

Warden

MEMO

From Kenneth D. Brown To John W. Walton

SUBJECT Booher, George Donald FM 29509

DATE: Sept. 3, 1969

In reference to the diffieulty experienced by Mr. Booher while in this area, He lost three jobs before he was transferred. The first was at Modern Welding, where he lost his temper because the minister who was helping him out wouldn't let him use his car. At this point he quit. Second job he was fired from the Murray Iron Works in Burlington for allegedly asking a fellow employee to go outside with him and having in his hand at the time a length of pipe. He lost the Third job on a farm at Morning Sun because his boss said that he made him nervous.

Also, this agent took a 357 Magnum revolver from him even though this was supposed to be his wife's gun. This was done because it was in the house with Donald.

It should also be noted that The agent for the BCI in this area suspected Mr. Booher of attempting to rustle cattle.

cc. Mr. Struck
Mr. Linnenkamp
Mr. Stevens

[Reeeived Sep 4, 1969]

STATE OF IOWA
DEPARTMENT OF SOCIAL SERVICES

INTEROFFICE MEMORANDUM

Sept. 16, 1969

To: C. G. Stevens, Parole Agent

From: John Walton, Chief Parole and Probation Supervisor

Subject: George Donald Booher, FM #29509

Based on your Report of Violation dated 9-8-69, the Board of Parole revoked the parole of this subject on 9-13-69. If this subject is indicated by your report to be available for immediate return to the appropriate institution, arrangements for such return will be completed as soon as possible.

If local charges are now pending, please maintain such contacts as are necessary to be advised of developments and of the final disposition of such charges, advising this office immediately.

If delay is met in prosecution, please advise whether or not the local authorities are willing for subject to be immediately returned to the institution and later returned for disposition of local charges.

cc. Supervisor

File

Warrants to;
Warden Brewer.
Subject is in
O'Brien County Jail
ready for return.
J. W.

STATE OF IOWA

DEPARTMENT OF SOCIAL SERVICES

BUREAU OF ADULT CORRECTION SERVICES

REPORT OF VIOLATION

DATE: September 8, 1969

NAME: George Donald Booher

INST. & NUMBER: FM # 29509

ADDRESS: Box 239 Sutherland, Iowa

SENTENCE: 10 years Iowa State Penitentiary: Fort Madison, Iowa

OFFENSE(S): Forgery

DATE OF SENTENCE: 4/29/66

UNEXPIRED TIME: 2 years-4 months

DATE OF PAROLE (PROPATION): November 14, 1968

RULES VIOLATED:

#3. I will remain in such employment and under such supervision unless I have written consent of the Chief Parole Officer to change therefrom, I agree to keep myself gainfully employed during my parole period.

#4. I will not go beyond the territorial limits of O'Brien County without the written consent of the Chief Parole Officer.

#9. I will neither own nor operate an airplane, automobile, truck, motorcycle, or motor scooter without the written consent of the Chief Parole Officer.

RECOMMENDATION:

I would recommend that the parole of the above named man be revoked.

SUMMARY OF ABOVE VIOLATIONS:

#3. Agent Brown's reports shows that subject left two places of employment because of his temper.

#4. Subject was told that he could not go out of O'Brien County unless he had a travel permit.

#9. Subject was told that he was to have a valid driver's license and also show that he had insurance on his car before

a permit would be issued for him to own or operate a motor vehicle. Subject told me that he had lost his driver's license, So he was told to get another license. However I learned that his license was under suspension.

PREVIOUS PAROLE HISTORY:

The above named man was paroled to Agent Brown at Mount Pleasant, Iowa on November 14, 1968. Subject lost his first two places of employment due to his temper. In July Agent Brown transferred subject into t[illegible]my territory, which was Suth[illegible]and, Iowa. On July 14, 1969 I made contact with subject at Sutherland, Iowa. I had to wait for him to come home, when he came he was driving his car. I noted in his file that he had never been given permission to operate a car. So I asked to see his driver's license. He told me that he had lost them and that he would have to get another one. I told him that he was not to drive any more until such time he could show me a valid license. I also asked to see his Insurance on the car but he stated that he could not find it. The car was licensed to his wife, and she also stated that she could not find the insurance policy nor her husband's driver's license. I told the both of them that I would have to have proof of the Insurance and the driver's license or we could not issue any permit for subject to drive.

When I returned to the office I called Mr. John W. Walton to check on subject's story about the driver's license and also I noted in the file that he (Subject) had requested that he be transferred to the State of Minnesota. Mr. Walton told me that Minnesota had turned down subject's request for transfer, and that he would check at the driver's license bureau and see if subject did have a valid license.

I received a letter written to subject by John W. Walton on July 22, 1969, that he had checked with the driver's license bureau and found that subject's license was under suspension. Mr. Walton in his letter explained to subject that he would have to send in an SR-22 form to get his license back.

Due to the fact that I was going on vacation I wrote subject a letter and told him that Minnesota had rejected his request for transfer and that he would have to get employment here in Iowa.

When I first made contact with subject we talked about employment. He stated that he had not as yet found employment due to the fact he could not find work that would pay him what he wanted. I asked him what kind of employment he wanted and what kind of salary he thought he should have. He stated that he was a welder and that he should have a least $3.00 or $4.00 per hr. I told him that I could get him employment in Sioux City, but that he would have to start out at $2.25 per Hr., or perhaps at not more than $2.75 per hr. He stated that he would not work for this kind of money.

When I returned from my vacation I went to Sutherland, Iowa on August 20, 1969 to see subject. His father-in-law stated that subject had left their home and they did not know where he was, he stated that subject's wife had gone to Iowa City to the hospital to have a new baby. They stated that he had been gone for about two weeks. I put out a local pick up on subject O'Brien County. The sheriff of O'Brien County picked subject up. On September 3, 1969 I went to the O'Brien County sheriff's Office and I talked to subject. I asked him where he had been and he stated that he had been in Dakota City, Nebraska working for the Iowa Beef Packers until they went on strike. I told him I had a report that he was seen down by Mount Pleasant, Iowa and he stated that he had been. Also I had a report that subject was talked to by the Deputy sheriff of Plymouth County due to the fact subject was selling a lot of tools. I asked him where he got the tools and he stated that they were his. The O'Brien County sheriff stated in the presence of subject that subject had bought gas in Sutherland at a gas station and had drove off and not paid for it, and the sheriff took him back to Sutherland and subject paid for the gas, so no charges were filed. Subject also admitted that he continued to drive his car.

I learned that subject had gotten another driver's license but that it was no good as he had put down the wrong social security number and also had signed his name George Donald Booker, and used the address R R #2 Cherokee, Iowa.

I asked subject why he had done all of these things knowing that it was wrong and he stated that he knew he had done wrong but that when he learned Minnesota had turned

him down and that his wife was in the hospital he just went out and done what he was doing.

It is my feeling that this young man will never make a parole until he has different outlook on life than he has now. He feels that everyone is working against him and that he is worth much more on employment than he is paid. He has a very strong feeling about his ability as a welder and will not take anything he can get until such time he can prove to an employer that he is worth more money.

PRESENT STATUS OF SUBJECT:

Subject is now confined in the O'Brien County Jail at Primghar, Iowa. There are no Court Actions pending against subject at this time;

SIGNED C. G. Stevens
C. G. STEVENS, *Agent*
Bureau of Adult Correction Services

[Received, Sep 9 1969]

STATE OF IOWA
THE BOARD OF PAROLE
DES MOINES

DATE August 29, 1969

HOLD FOR

IOWA BOARD OF PAROLE

To: GEORGE SLEEPER
Sheriff: O'Brien County, Iowa
Primghar, Iowa

Subject: GEORGE DONALD BOOHER

Institution: Fort Madison (Penitentiary) Parolee X

Kindly hold in safekeeping, while awaiting disposition by this Department, the above named subject who is under our supervision, having been sentenced to the institution indicated above.

Very truly yours,
R. W. BOBZIN, *Secretary*
Iowa Board of Parole and
Administrator Interstate Compact

By C. G. Stevens
C. G. STEVENS
Parole Agent

Copy-Agent
File
Sheriff
O'Brien County

The above named man is in the O'Brien County Jail. Was arrested on August 28, 1969 by sheriff George Sleeper.

I am going to submit a violation report to the Iowa Board of Parole, with recommendation to revocate subject's parole.

C. G. Stevens
Agent

[Received, Sep 2, 1969]

IOWA BOARD OF PAROLE
DES MOINES

STATE OF IOWA, }
County of Polk; } ss.

KNOW ALL MEN BY THESE PRESENTS;

That George Donald Booher, #29509-FM was on the 29th day of April 1966, convicted in the District Court of O'Brien County and State of Iowa, of the crime of forgery and was sent to the Iowa State Penitentiary at Fort Madison, Iowa; that said George Donald Booher was admitted to said Iowa State Penitentiary on the 3rd day of May, 1966, that in accordance with the provisions of Chapter 192, of the Acts of the Thirty-second General Assembly of Iowa, approved April 2, 1907, and the rules adopted by the Board of Parole, said George Donald Booher was on the 14th day of November, 1968, paroled by said Board of Parole, to go outside of the buildings and enclosure of said Iowa State Penitentiary, upon the conditions stipulated in a certain parole agreement, executed in duplicate, and signed by said parolee.

AND WHEREAS it has come to the knowledge of the Board of Parole that said George Donald Booher has violated the conditions of said parole agreement and has thereby forfeited his right to remain longer on parole, therefore, it is hereby ordered by said Board that said George Donald Booher be forthwith arrested and returned to said Iowa State Penitentiary to serve as much of the remainder of his sentence as said Board shall hereafter determine.

It is further ordered that Warden's Authorized Officer, or any Sheriff or Peace Officer of the State of Iowa be and he is hereby authorized and directed to arrest said George Donald Booher whenever and wherever found, and return him to the said Iowa State Penitentiary.

WITNESS the Board of Parole of the State of Iowa by its Chairman and Secretary, at Des Moines, this 13th day of September, A.D. 1969.

John E. Andrews
Chairman.

Certified by R. W. Bobzin
Secretary.

IOWA DEPARTMENT OF PUBLIC SAFETY
DRIVERS LICENSE DIVISION

File A 156915
Date February 21, 1969
Cert. No. 48517

G. DONALD BOOHER
2704 Washington
Burlington, Iowa

OFFICIAL NOTICE

YOU ARE HEREBY NOTIFIED THAT:

Effective March 21, 1969 your privileges to operate motor vehicles are suspended under the provisions of Section 321.210 Par 7, Code of Iowa, (Serious violation), until June 10, 1969.

You are ordered to send or deliver all your licenses or permits to operate motor vehicles to: Highway Patrol Dist. 13, City Hall, Mt. Pleasant, Iowa

FAILURE TO DO SO WILL RESULT IN PROSECUTION AGAINST YOU

OFFICIAL NOTICE

The below notice Does apply to you:

Effective June 10, 1969 your privileges to *operate* motor vehicles will Remain Suspended in accordance with the provisions of Section 321A.17 (1) (2), Code of Iowa, until such time as you post proof of financial responsibility.

Effective March 21, 1969 your privileges *to* register and *have* motor vehicle registrations and plates for vehicles owned in whole or in part by you are suspended under the provisions of Section 321A.17 (1) (2) until such time as you post proof of financial responsibility with the department.

You are hereby ordered to send or deliver all of your registration certificates, plates and licenses to operate motor vehicles to: Dist. 13.

FAILURE TO DO SO WILL RESULT IN PROSECUTION AGAINST YOU

WARNING: YOU ARE NOT ENTITLED TO OPERATE ANY MOTOR VEHICLES IN THIS STATE UNTIL YOU HAVE MET THE NECESSARY REQUIREMENTS AND RECEIVED AN OFFICIAL NOTICE FROM THIS DEPARTMENT, TER

Distribution:
Subject
File Copy
Patrol Division
Sheriff
Chief of Police Des Moines

A156915

INSTRUCTIONS TO DELIVERING EMPLOYEE

☐ Show to whom, date, and address where delivered

☐ Deliver ONLY to addressee

(*Additional charges required for these services*)

RECEIPT

Received the numbered article described below.

REGISTERED NO.

CERTIFIED NO.

INSURED NO.

SIGNATURE OR NAME OF ADDRESSEE (*Must always be filled in*)
Donald Booher

SIGNATURE OF ADDRESSEE'S AGENT, IF ANY

DATE DELIVERED
Feb 24, 1969

SHOW WHERE DELIVERED (*only if requested*)

D.O.B. 09-17-38
lic. 3821560 68-70
Soc. Sec. 477-42-4557
SJK

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA DAVENPORT DIVISION

G. DONALD BOOHER, #29509
Petitioner,

vs.

LEE AND O'BRIEN COUNTIES AND THE STATE OF IOWA, *et al.*,
Respondents.

Civil No. 3-897-D
Order

[Filed Jun 10, 1970, R. E. Longstaff, *Clerk*, U.S. District Court, Southern District of Iowa]

This matter is before the Court on the petition of G. Donald Booher for a writ of habeas corpus. Booher, currently an inmate of the Iowa State Penitentiary at Fort Madison, Iowa, will be referred to herein as petitioner.

Petitioner's complaint is vexatious. It is difficult to know exactly what is being alleged. Nevertheless, the Court has caused counsel for the respondent to file various papers so that an extensive review of the circumstances relating to petitioner's present confinement might be had.

It appears that petitioner is complaining, at least in part, because he was arrested and returned to prison on a parole revocation without a hearing or other judicial review.

Consideration is first given to petitioner's allegations relative to his arrest and return to prison without hearing or appointment of counsel.

Under the Iowa Law, one returned to imprisonment as a parole violator is not entitled to a hearing or other judicial review of the actions of the State Parole Board in revoking his parole. See *Curtis* v. *Bennett*, 256 Iowa 1164; 131 N.W.2d 1. The Iowa Law has been held sufficient for Federal Constitutional purposes. *Curtis* v. *Bennett*, 351 F.2d 931 (8th Cir. 1965). The case of *Mempa* v. *Rhay*, 389 U.S. 128 (1967) decided by the United States Supreme Court applies to situations involving a deferred sentence

and does not apply under the facts presented here. See *Williams* v. *Patterson*, 389 F.2d 374 (10th Cir. 1968); *Rose* v. *Haskins*, 388 F.2d 91 (6th Cir. 1968). Petitioner's complaint in this regard is without merit.

The Court has carefully examined the remainder of the petition in this case. No complaint is evident therein that would be cause for the issuance of this Court's writ. The relief requested by petitioner will be denied.

IT IS ORDERED that the petition for a writ of habeas corpus filed March 11, 1970 by G. Donald Booher be and is hereby denied.

Dated this 10th day of June, 1970.

Roy L. Stephenson
Chief Judge

6-10-70 Copy mailed to Petitioner & Attorney General.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
DAVENPORT DIVISION

G. Donabd Booher, #29509
Petitioner,

vs.

Lee and O'Brien Counties
and the State of Iowa, *et al.,*
Respondents.

ss. Civil No. 3-897-D

Certificate of
Probable Cause

[Filed, June 16, 1970, R. E. Longstaff, *Clerk*, U.S. District Court, Southern District of Iowa]

Petitioner, asks that the Court issue its writ of probable cause and order appeal of his writ to the eight circuit court of Appeals at St. Louis, Missouri, on the ground that the Petition seeks it's only relief on "The State of Iowa, unlawfully does use a General Warrant without due process of law" in all parole violation cases which is forbidden in all such cases by the federal statutes.

Petitioner, filed his Writ under the United States Civil rights act Title 18 U.S.C. 241-242 of the U.S. Federal Code, and was denied a return filed copy of the same, this requisite is not an act of due process of law, but an act of all State of Iowa Judges that hide behind Chapter 4 Statute 2 of the (1962) code of Ia.

Petitioner, therefore asks this court for its certificate of probable cause, and movant to the higher Court within (7) days. Dated this 15th day of June, A.D., 1970.

State of Iowa }
County of Lee } ss:

Respectfully Submitted By
G. Donald Booher
G. Donald Booher, No. 29509
Box 316
Iowa State Penitentiary
Fort Madison, Iowa 52627

Sworn and subscribed to before me Wm. F. Abel, a notary public at the penitentiary at Fort Madison, for the State of Iowa on the 15th day of June, A.D., 1970.
My commission expires on the 4th day of July, A.D., 1972.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
DAVENPORT DIVISION

G. DONALD BOOHER, #29509
Petitioner,

vs.

LEE AND O'BRIEN COUNTIES AND THE STATE OF IOWA, *et al.*,
Respondents.

Civil No. 3-897-D
Order

[Filed Jun. 16, 1970, R. E. Longstaff, *Clerk*, U. S. District Court Southern District of Iowa]

This matter is before the Court on the application of G. Donald Booher for a certificate of probable cause to appeal.

On March 11, 1970, Booher, hereinafter called petitioner, filed a vexatious complaint with this Court. The complaint, while referring to 18 U.S.C. §§ 241-242, is, in reality, a petition for a writ of habeas corpus. Recognizing that petitioner was proceeding pro se, the Court ignored all technical procedural requirements and directed the Iowa Attorney General to respond.

Various papers have been filed, at this Court's request, relating to petitioner's present state of confinement and to his attempts, on the state level, to extract himself therefrom.

After giving all the matters before the Court careful and deliberate consideration, the Court, on June 10, 1970, entered an order denying petitioner the relief requested. From that order application is now made for a certificate of probable cause to appeal.

As related in the order of June 10, 1970, the only complaint evident in the petition filed herein relates to the revocation of petitioner's parole without the benefit of his having a hearing or appointment of counsel. As stated in said order, the law in this regard is well settled. See *Curtis v. Bennett*, 351 F.2d 931 (8th Cir. 1965).

Any appeal from the Court's order herein would be frivolous and without merit. Under such circumstances,

the application for a certificate of probable cause should be denied.

ORDER

IT IS ORDERED that the application for a certificate of probable cause to appeal filed June 16, 1970 by G. Donald Booher be and is hereby denied.

Dated this 16th day of June, 1970.

Roy L. Stephenson
Chief Judge

6-17-70 copy mailed to Petitioner,
Attorney General.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 20425

G. DONALD BOOHER, #29509, *Appellant*, vs. LEE AND O'BRIEN COUNTIES AND THE STATE OF IOWA, *et al.*, *Appellees.*	Appeal from the United States District Court for the Southern District of Iowa.

[Filed July 28, 1970, R. E. Longstaff, *Clerk*, U. S. District Court Southern District of Iowa]

This cause comes before the Court on consideration of an application for certificate of probable cause. In connection with the application Court has examined the original files of the United States District Court for the Southern District of Iowa in this case being No. 3-897-D Civil. Being fully advised in the premises it is now here ordered that the application for certificate of probable cause be, and it is hereby, granted. The Clerk of this Court is directed to regularly docket this appeal and to consolidate this appeal with Cause No. 20328, *John J. Morrissey* v. *Lou V. Brewer*, Warden, heretofore docketed June 3, 1970.

It is ordered that Mr. W. Don Brittin of the Des Moines, Iowa Bar be, and he is hereby, appointed to represent appellants on these consolidated appeals. It is further ordered that appointed counsel prepare a joint brief in this cause and No. 20328. Notwithstanding this Court's order entered in Cause No. 20328, appointed counsel may have forty days from today's date in which to serve and file five clearly legible typewritten copies of the joint brief of appellants in said consolidated appeals. One additional copy of said brief should be served on the Attorney General for the State of Iowa. Typewritten briefs are to be on letter-sized paper and fastened in the left margin.

July 23, 1970

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 20,328.

John J. Morrissey,

Appellant,

v.

Lou V. Brewer, Warden,

Appellee.

No. 20,425.

G. Donald Booher,

Appellant,

v.

Lee and O'Brien Counties and the State of Iowa, et al.,

Appellees.

Appeals from the United States District Court for the Southern District of Iowa.

[April 21, 1971.]

Before MATTHES, Chief Judge, VAN OOSTERHOUT, MEHAFFY, GIBSON, LAY, HEANEY and BRIGHT, Circuit Judges, EN BANC.

MATTHES, Chief Judge.

These consolidated appeals are from orders entered in two separate cases in the United States District Court for the Southern District of Iowa denying appellants' petitions for writs of habeas corpus.

Appellant John J. Morrissey was convicted in January of 1967 in the District Court of Iowa, Linn County, upon his plea of guilty to the charge of false drawing or uttering of checks in violation of Iowa Code §713.3 (1966), and was sentenced to a term of imprisonment not to exceed 7 years. After serving a part of this sentence in the Iowa State Penitentiary, Morrissey was paroled from the institution on June 20, 1968. On January 24, 1969, he was arrested as a parole violator, and on January 31, 1969, after review of the parole officer's report, the Iowa Board of Parole entered an order revoking his parole, whereupon he was returned to the Iowa State Penitentiary.[1]

Appellant G. Donald Booher was convicted in April of 1966 in the District Court of Iowa, O'Brien County, upon his plea of guilty to the charge of forgery in violation of Iowa Code §718.1 (1962), and was sentenced to a term of imprisonment not to exceed 10 years. Having served a portion of this sentence in the Iowa State Penitentiary, Booher was granted a parole on November 14, 1968. In August of 1969, however, Booher was arrested for violation of his parole. On September 13, 1969, on the basis of a report of violations filed by Booher's parole officer, the Iowa Board of Parole revoked his parole, and he was recommitted to the Iowa State Penitentiary to complete service of his sentence.[2]

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[1] The Iowa Board of Parole revoked appellant Morrissey's parole on the basis of a report submitted January 28, 1969 by the parole agent charged with his supervision. The report set forth numerous violations of the conditions of Morrissey's parole including, *inter alia*, purchase of an automobile under an assumed name and unauthorized operation of this vehicle, purchase of furniture by use of an assumed name in order to obtain credit, and several violations of the employment conditions of his parole agreement.

[2] On September 8, 1969 the parole officer charged with the supervision of appellant Booher filed a report with the Iowa Board of Parole which charged that Booher, in violation of specific conditions of his parole, had left the territorial limits of O'Brien County, Iowa, without the consent of his parole officer, had obtained an Iowa driver's license by use of an assumed name after suspension of his own license for a serious traffic violation, and had

After unsuccessfully pursuing state remedies,[3] each appellant, in separately filed actions, petitioned the federal district court for a writ of habeas corpus alleging that his constitutional rights had been violated because he did not receive a hearing upon revocation of his parole. Morrissey's petition was denied by order entered April 15, 1970, Booher's by order of June 16, 1970. The district court denied applications for certificates of probable cause to appeal in each case. Subsequently, our court granted certificates of probable cause, appointed counsel, and ordered that the appeals be consolidated and submitted to the court en banc.

The sole issue presented for review is whether appellants' constitutional rights to due process were violated when the Iowa Board of Parole revoked their paroles without a hearing. Appellants contend that the Due Process Clause of the Fourteenth Amendment requires that a hearing be held prior to the revocation of parole, that at such hearing they be given the opportunity to confront and cross-examine witnesses and to present evidence on their own behalf.

Consideration of the issue raised by appellants requires an understanding of the Iowa procedure for the granting and revocation of paroles. By statute, Iowa Code §247.1 et seq., Iowa has created an independent three member board of parole which is appointed by the governor with the approval of the senate. Not more than two members

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unlawfully operated a motor vehicle using this falsely obtained license. The report also set forth a number of violations relating to the employment conditions of his parole agreement.

[3] Appellant Morrissey petitioned the District Court, Lee County, Iowa, alleging that he should have been granted a hearing relative to his parole violation. This was denied on June 26, 1969. Subsequently, he filed a petition for writ of habeas corpus in the Supreme Court of Iowa, which was dismissed on the grounds that the petition was not made to the court or judge most convenient to him; that the legality of his confinement had been adjudicated by the Lee County District Court's ruling; and, that if he was entitled to any relief the proper remedy was by way of appeal from the denial of his habeas petition. Morrissey filed a notice of appeal from this denial to the Iowa Supreme Court, which was dismissed by that court on September 12, 1969 because not timely filed.

Appellant Booher filed a petition for writ of habeas corpus in the District Court of Lee County, Iowa, alleging that his constitutional rights were violated because he had not been granted a hearing relative to his parole revo-

may belong to the same political party, and at least one member must be a practicing attorney. For administrative purposes, the board is a part of the department of social services. The legislature has conferred upon the board the power to grant paroles to convicted persons committed to the state penitentiary or reformatory and to establish rules and conditions under which paroles may be granted. Once an inmate is placed on parole, he is under the supervision of the director of the division of corrections of the department of social services, but while on parole, he remains in the legal custody of the warden or superintendent and under the control of the chief parole officer. Section 247.9 of the Iowa Code provides that all paroled prisoners are subject, at any time, to be taken into custody and returned to the institution from which they were paroled. Parole agents charged with the supervision of paroled persons may not revoke a parole, but may recommend that the board of parole take this action.

The Iowa statutes neither prohibit nor expressly pro-

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cation. This petition was denied on November 26, 1969. Booher subsequently filed two other petitions with the Lee County District Court which were summarily denied. He also filed a number of other documents with the Iowa courts variously denominated as writs of equity, mandamus, injunction, notice of default and motion to vacate judgment, all of which were summarily dismissed by the courts to which they were addressed. Booher did not appeal to the Iowa Supreme Court from any of these denials. However, he was advised by letter of the County Attorney of O'Brien County, Iowa, that the Iowa Supreme Court had repeatedly taken the position that a parolee was not entitled to a hearing on parole revocation.

For purposes of exhaustion of state remedies it would have been more orderly had appellants properly perfected appeals to the Iowa Supreme Court from the denial of relief in the lower state courts. However, in view of the consistent position taken by the Iowa Supreme Court in holding that there is no constitutional right to a hearing in revocation proceedings (*Cole* v. *Holliday*, 171 N.W.2d 603 (Iowa 1969); *State* v. *Rath*, 258 Iowa 568, 139 N.W.2d 468 (1966); *Curtis* v. *Bennett*, 256 Iowa 1164, 131 N.W.2d 1 (1964), cert. denied, 380 U.S. 958 (1965); *Pagano* v. *Bechly*, 211 Iowa 1294, 232 N.W. 798 (1930)), as discussed infra, it appears that an appeal on this issue to the Iowa Supreme Court would be futile. In *Cole* v. *Holliday*, supra at 606, that court stated that it would adhere to its position unless the United States Supreme Court preempted this area of the law. Moreover, appellees do not contend that appellants should have made any further attempts to exhaust state remedies.

vide for notice and hearing before revocation of parole.[4] In *Curtis* v. *Bennett*, 256 Iowa 1164, 131 N.W.2d 1 (1964), cert. denied, 380 U.S. 958 (1965) one of the questions presented to the Iowa Supreme Court was whether the Iowa statutes should be interpreted as requiring that a hearing be afforded prior to revocation of parole. In addressing itself to this issue, the court held:

> "The Iowa statutes do not provide for such a hearing before the parole board. The board is given no power to issue subpoenaes nor swear witnesses. There is nothing in the statutes which expressly or by implication requires the board to enter findings of fact of the kind made by judicial bodies. The absence of such provisions shows the legislature did not intend that the board should conduct any such hearings. In other words, the Iowa statutes contemplate that the board of parole shall be guided by the information which shall become available to it through its own investigation procedures. It is thus an administrative function rather than judicial. When the board grants a prisoner a parole, it does so as a matter of grace and not as a duty. It has the right to impose such conditions as it feels proper and, when the prisoner accepts the parole, he does so subject to its terms and conditions. He cannot later in a judicial hearing complain as to their fairness or propriety."

Id. at 3-4.

In *Curtis* v. *Bennett*, the Iowa court also held that a parolee had no constitutional right to notice and hearing before the board could revoke his parole. In so holding, the court reaffirmed the position taken in its earlier decision in *Pagano* v. *Bechly*, 211 Iowa 1294, 232 N.W. 798 (1930), that parole is a matter of grace on the part of the

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[4] Some states, by express statutory provision, require notice and hearing prior to revocation of parole. Other states by statute expressly dispense with the necessity of notice and hearing before revocation. However, it appears that the majority of states, like Iowa, have neither reserved the right of summary revocation nor required notice and hearing by exprss legislative enactment. For discussion of the various types of statutes and their judicial interpretation, see 29 A.L.R.2d Anno. 1074.

sovereign and that a defendant acquires no vested rights when granted a parole.[5]

As the district court noted in the orders denying appellants' petitions for habeas corpus, our court has approved the procedure followed by Iowa on revocation of parole. In *Curtis* v. *Bennett*, 351 F.2d 931 (8th Cir. 1965)[6] we held:

> "The Iowa Court in its opinion sets out the contentions made by the petitioner and holds that all proceedings in connection with petitioner's parole, the revocation thereof and his retaking are in conformity with Iowa law. Petitioner makes the same contentions here. We believe that all of the contentions now urged by petitioner were fairly considered and properly answered by the Iowa Supreme Court.
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> "A parole is a matter of grace, not a vested right. A large discretion is left to the States as to the manner and terms upon which paroles may be granted and revoked. Federal due process does not require that a parole revocation be predicated upon notice and opportunity to be heard."

Id. at 933.

Appellants, however, urge that we re-examine the position espoused in *Curtis*, and hold that the revocation of

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[5] The Iowa Supreme Court also discussed and gave approval to the other views supporting the holding that there is no constitutional right to notice and hearing upon revocation of parole. These views, set out in the court's opinion in *Curtis* v. *Bennett*, 256 Iowa 1164, 131 N.W.2d 1, 3 (1964), cert. denied, 380 U.S. 958 (1965) and in 29 A.L.R.2d Anno. 1074, 1077-78 include the theory that conditional liberty after conviction does not free the prisoner from service of his sentence, but merely extends the prison walls so as to allow him to serve his sentence outside the prison but while still in the custody and under the control of the prison authorities. Another theory is that conditional liberty after conviction is in the nature of a contract, the terms of which include a provision for summary revocation. It is reasoned that the convicted person is free to accept or reject the "contract" but that once accepted, the terms are binding upon him. The third view is that the convicted person was afforded full constitutional protection at the trial at which he was convicted. Subsequent to conviction, his status is that of an escaped felon, and the constitutional guarantees given a person accused of crime do not extend to a later enforcement of punishment already validly imposed.

[6] After being denied relief by the Iowa Supreme Court, petitioner Curtis sought a writ of habeas corpus on the same grounds in the United States District Court for the Southern District of Iowa, which was denied. The matter came before our court on petitioner's application for certificate of probable cause to appeal from that denial.

their paroles without a hearing was violative of the basic requirements of due process.

For support appellants rely almost exclusively upon and adopt the reasoning of the opinion in *Hahn* v. *Burke*, 430 F.2d 100 (7th Cir. 1970). In *Hahn*, the Seventh Circuit held that the revocation of *probation* without a hearing violated the probationer's constitutional right to due process under the Fourteenth Amendment. In so holding, the Court recognized that probation is a privilege and not a right, but found that "essential procedural due process no longer turns on the distinction between a privilege and a right." Id. at 103. In reaching this conclusion the Court applied the reasoning of the Supreme Court in *Goldberg* v. *Kelly*, 397 U.S. 254 (1970), in which it was held that termination of public assistance payments to a welfare recipient by the State without affording him a per-termination evidentiary hearing deprives the recipient of procedural due process in violation of the Fourteenth Amendment. In *Goldberg*, the Supreme Court found that welfare ". . . benefits are a matter of statutory entitlement for persons qualified to receive them. Their termination involves state action that adjudicates important rights. The constitutional challenge cannot be answered by an argument that public assistance benefits are 'a privilege and not a right.'" Id. at 262. (Footnote omitted). The Supreme Court reasoned that the extent to which procedural due process must be afforded the recipient "depends upon whether the recipient's interest in avoiding that loss outweighs the governmental interest in summary adjudication." Id. at 263. The *Hahn* court applied this same balancing test to conclude that the probationer's loss of freedom outweighed the added state burden of granting a hearing prior to revocation of his probation. In its opinion, the Seventh Circuit recognized that the Supreme Court in *Escoe* v. *Zerbst*, 295 U.S. 490 (1935) had held that there is no constitutional right to a hearing on revocation of probation apart from any statute. However, the *Hahn* court interpreted this statement in *Escoe* as indicating "only that the [Supreme] Court's opinion was not based on a constitutional right to a hearing and not as a binding precedented rejection of such a constitutional right." Id. at 105. The court entertained the view that the basis of the *Escoe* statement was the

"privilege-right" distinction and that this has been undermined by recent Supreme Court decisions.[7]

With these considerations in mind, we are compelled to examine the test delineated by the Supreme Court in *Goldberg* v. *Kelly*, supra at 262-63, which led the Seventh Circuit in *Hahn* to conclude that due process required that a hearing be held on revocation of *probation*. In explaining the analytical process for utilization of this "balancing test," the Supreme Court in *Goldberg* held:

> "Accordingly, as we said in *Cafeteria & Restaurant Workers Union* v. *McElroy*, 367 U.S. 886, 895 (1961), 'consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action.' See also *Hannah* v. *Larche*, 363 U.S. 420, 440, 442 (1960)."

Id. at 263. The "precise nature of the government function" with which we are here concerned is the whole scheme of the granting of paroles to imprisoned convicts, as established by the Iowa statutes.

Parole relates to an administrative action taken after the convict has served a portion of his sentence behind prison walls. It is not a suspension of sentence, but "a substitution during the continuance of the parole, of a lower grade of punishment, by confinement in the legal custody and under the control of the warden within the specified prison bounds outside the prison, for the confinement within the prison adjudged by the court." *Jenkins* v. *Madigan*, 211 F.2d 904, 906 (7th Cir.), cert. denied, 348 U.S. 842 (1954). The legal procedures providing for parole are a part of the legislative function of creating a penological system which encompasses, of course, rules to govern the care and discipline of inmates. Parole does not end or in any way affect a prisoner's sentence, but is a correctional device authorizing service

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[7] The Supreme Court decisions to which the court referred are *Goldberg* v. *Kelly*, 397 U.S. 254 (1970); *Shapiro* v. *Thompson*, 394 U.S. 618 (1969); *Sherbert* v. *Verner*, 374 U.S. 398 (1963); *Slochower* v. *Board of Higher Education*, 350 U.S. 551 (1956).

of sentence outside the penitentiary. *People ex rel Abner v. Kinney*, 300 Ill.2d 201, 195 N.E.2d 651, 653 (1964).

In *Rose* v. *Haskins*, 388 F.2d 91 (6th Cir.), cert. denied, 392 U.S. 946 (1968), on facts which closely parallel those before us, the court squarely held that "[a] state prisoner does not have a constitutional right to a hearing on a state parole revocation." Id. at 95. The petitioner in *Rose* was an Ohio prisoner whose parole was revoked without a hearing. The Ohio parole statutes, like those of Iowa, contained no provision for hearing on parole revocation, and the Supreme Court of Ohio, like the Supreme Court of Iowa, had held that there was no right to a hearing on revocation of parole. *In re Varner*, 166 Ohio St. 340, 142 N.E.2d 846 (1957). In concluding that the Ohio procedure for revocation of parole deprived the prisoner of no constitutional guarantees to which he was entitled, the court pointed out that the rights which the parolee claimed to be violated apply *prior to conviction* and not to a prisoner serving a sentence imposed upon a valid judgment. The court further reasoned that under Ohio law a parolee is in a position similar to that of a "trusty." The parolee and the trusty continue to serve their sentences even though they enjoy the privilege of leaving the confines of the prison walls. Both remain in the custody and under the control of the prison authorities. The court stressed that federal courts should be reluctant to interfere with state prison discipline, quoting with approval from *United States* v. *Sullivan*, 55 F.Supp. 548, 550 (E.D. Ill. 1944):

> "In disposing of this contention, we are not called upon to review the record of any judicial proceeding. We are confronted merely with the question of whether the state administrative body, endowed by statute with discretion to determine whether a parole should be granted, may, after having once acted favorably, thereafter revoke the earlier order and deny parole. In the performance of their duties, such administrative officers are called upon to exercise judgment and discretion, to investigate, deliberate and decide. People v. Joyce, 246 Ill. 124 and 135, 92 N.E. 607, 20 Ann.Cas. 472. The court's jurisdiction and duties ended when the judgment was entered; thereafter the execution of the sentence was within the sole authority of the executive department of the state. The

> manner of executing the sentence and extension or mitigation of punishment are fixed by the legislative department and what it has determined must be put in force and effect by the administrative or executive officers in whom the power is lodged. . . . The administration of the parole law is the exercise, through the administrative department, of the state's power to keep safely, supervise and discipline its prisoners. Such powers are not judicial but are matters of 'prison discipline.' "

Rose v. *Haskins*, supra at 96.

Our court is firmly committed to the principle that prison officials are vested with wide discretion in controlling persons committed to their custody. *Burns* v. *Swenson*, 430 F.2d 771 (8th Cir. 1970); *Courtney* v. *Bishop*, 409 F.2d 1185 (8th Cir.), cert. denied, 396 U.S. 915 (1969); *Douglas* v. *Sigler*, 386 F.2d 684 (8th Cir. 1967). Unless infringement of a paramount constitutional right is involved, as, for example, in the case of infliction of cruel and unusual punishment (*Jackson* v. *Bishop*, 404 F.2d 571 (8th Cir. 1968)), federal courts are loathe to interfere. *Burns* v. *Swenson*, supra; *Courtney* v. *Bishop*, supra.

It cannot be disputed that the state has a legitimate interest in deciding whether convicted felons should be granted parole. Broad discretion must be vested in a responsible body to enable it, in each individual case, to balance the need to protect the welfare and security of society with the desirability of placing a convicted person on parole in order to promote his rehabilitation and restoration to a useful life. The function of the parole board in weighing these countervailing factors when determining whether to grant parole was aptly described in *Menechino* v. *Oswald*, 430 F.2d 403, 407 (2d Cir. 1970):

> "It must make the broad determination of whether rehabilitation of the prisoner and the interests of society generally would best be served by permitting him to serve his sentence beyond the confines of prison walls rather than by being continued in physical confinement. In making that determination the Board is not restricted by rules of evidence or procedures developed for the purpose of determining

legal or factual issues. It must consider many factors of a non-legal nature, such as psychiatric reports with respect to the prisoner, his mental and moral attitudes, his vocational education and training, the manner in which he has used his recreation time, his physical and emotional health, his intrapersonal relations with prison staff and other inmates, his habits, and the nature and extent of community resources that will be available to him upon his release, including the environment to which he plans to return."

We are persuaded that the same types of non-legal, non-adversary considerations often prevail in the parole board's determination of whether a prisoner is a "good risk" for remaining outside the prison walls and in its decision to revoke a parole.

Moreover, we think that the function of the prison authorities and the parole board is not unlike that of the Federal Government as proprietor of a military installation, as discussed in *Cafeteria & Restaurant Workers Union* v. *McElroy*, 367 U.S. 886, 896 (1961). Both are charged with the management of their own internal affairs, and both have traditionally been allowed broad discretion in the handling of matters within their jurisdictions. In the *Cafeteria & Restaurant Workers Union* case the Supreme Court weighed this proprietary function of the Government with the private interest of an employee who was summarily excluded from the premises of a military installation for failure to meet security requirements, and concluded that the action taken, without a hearing and without advice as to the specific grounds for the exclusion, was not violative of the right to due process. Compare also *Jay* v. *Boyd*, 351 U.S. 345, 354 (1956).

While we recognize the importance which the individual parolee attaches to being allowed to remain outside the prison walls while serving his sentence, we are not constrained to hold that his interest in obtaining a hearing on revocation of that privilege is sufficient to override the interest of the state and the prison authorities in effectively managing internal disciplinary and custodial affairs. As opposed to the welfare recipient in *Goldberg* v. *Kelly*, supra, the prisoner has no statutory right, even if "qualified," to be granted conditional liberty or allowed to remain on parole.

Moreover, if boards of parole were required to grant hearings, adversary in nature, with the full panoply of rights accorded in criminal proceedings, their function as an administrative body acting in the role of parens patriae would be aborted.[8] The probable result of the imposition of such stringent requirements upon their method of operation would actually be to decrease the number of paroles granted due to the heavy burden placed upon the administrative processes of supervision and investigation.[9]

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[8] In *Hyser* v. *Reed*, 318 F.2d 225, 237 (D.C. Cir.), cert. denied, sub nom *Thompson* v. *United States Board of Parole*, 375 U.S. 957 (1963), the court, sitting en banc, held that procedural due process was not required by the constitution in federal parole revocation proceedings, Judge (now Chief Justice) Burger described the function of a parole board:

> "The Bureau of Prisons and the Parole Board operate from the basic premise that prisoners placed in their custody are to be rehabilitated and restored to useful lives as soon as in the Board's judgment that transition can be safely made. . . . Thus there is a genuine identity of interest if not purpose in the prisoner's desire to be released and the Board's policy to grant release as soon as possible. Here there is not the attitude of adverse, conflicting objectives as between the parolee and the Board inherent between prosecution and defense in a criminal case. Here we do not have pursuer and quarry but a relationship partaking of parens patriae. In a real sense the Parole Board in revoking parole occupies the role of parent withdrawing a privilege from an errant child not as punishment but for misuse of the privilege."

[9] We do not view our decision as a categorical rejection of the holding in *Hahn* v. *Burke*, supra, that a probationer has a constitutional right to a hearing before revocation of his probation. The Seventh Circuit in *Hahn*, supra at 105, n.5, specifically noted that it was not faced with the question of the constitutional right to a hearing upon revocation of *parole* and did not purport to decide that issue. Likewise, we do not pass upon whether there is a constitutional right to a hearing upon revocation of probation.

However, since appellants urge that for purposes of the applicability of procedural due process probation and parole should be treated alike, we deem it appropriate to delineate what we view as significant differences between the two. Probation is the release of the defendant by judgment of the court before sentence has commenced. (Iowa Code § 247.20). It is judicial action taken before the prison door is closed and without the defendant ever being placed under the direct control of the prison authorities. The conditional liberty accorded on probation may be revoked or abrogated only by a subsequent judicial action, which by its normal function is amenable to the granting of notice and hearing. See *McCoy* v. *Harris*, 108 Utah 407, 160 P.2d 721, 723 (1945). Conversely, as the Iowa court noted in *Curtis* v. *Bennett*, 256 Iowa 1164, 131 N.W.2d 1, 3 (1964), cert. denied, 380 U.S. 958 (1965), the parole board is not equipped to conduct hearings. The board has no power to issue subpoenas or swear witnesses, and does not purport to conduct proceedings of a judicial nature.

In holding that a prisoner has no constitutional right to a hearing upon revocation of his parole, we emphasize, however, that the parolee cannot be made the subject of arbitrary action. As noted by the Iowa Supreme Court in *Curtis* v. *Bennett*, 256 Iowa 1164, 131 N.W.2d 1 (1964), cert. denied, 380 U.S. 958 (1965), where the parolee alleges as basis for relief that he is not the party intended, that the revocation is a forgery, or that the officials attempting to revoke are without authority, the legality of his confinement may be inquired into by habeas corpus. Id. at 4.

Contending that *Mempa* v. *Rhay*, 389 U.S. 128 (1967) supports their position that the Due Process Clause of the Fourteenth Amendment requires a hearing on revocation of parole,[10] appellants argue that revocation of parole is a stage in the criminal proceeding. We are not convinced that *Mempa* lends support to appellants' position, nor do we agree with the postulate upon which their contention rests.

In *Mempa* v. *Rhay*, supra at 130, the Supreme Court at the outset of its opinion stated that "these consolidated cases raise the question of the extent of right to counsel *at the time of sentencing* where the sentencing has been deferred subject to probation." (Emphasis added). The Washington court had granted probation to the defendant upon his conviction, but, pursuant to the provisions of Wash. Rev. Code §§9.95.200, 9.95.210, had deferred actual imposition of sentence. Upon revocation of the defendant's probation, the trial judge imposed sentence. The Supreme Court did not question the authority of the state to defer sentencing and couple that proceeding with revocation of probation, but found that counsel must be afforded at this deferred sentencing stage of the proceeding. In so holding, the Court reiterated the position taken in its earlier right-to-counsel decisions that "appointment of counsel for an indigent is required at every stage of a criminal proceeding where substantial rights of a criminal accused may be affected." Id. at 134.

The core of *Mempa* is that because sentencing, whenever and however it takes place, is a stage in the criminal pro-

[10] Appellants do not seek relief on the basis of denial of counsel but merely argue that the *Mempa* holding supports their contention of a right to a hearing as a requirement of due process.

ceeding against an accused, the Sixth Amendment as applied through the Due Process Clause of the Fourteenth Amendment requires that the right to counsel be afforded at sentencing.

We cannot agree that revocation of parole is a stage of the criminal proceeding.[11]

> "A criminal action is terminated by the final judgment entered upon a plea or verdict of guilty. Frad v. Kelly, 302 U.S. 312, 317, 58 S.Ct. 188, 82 L.Ed. 282. Final judgment means sentence, and sentence means final judgment. Miller v. Aderhold, 288 U.S. 206, 210, 53 S.Ct. 325, 77 L.Ed. 702; Hill v. United States ex rel. Wampler, 298 U.S. 460, 464, 56 S.Ct. 760, 80 L.Ed. 1283; Berman v. United States 302 U.S. 211, 212, 58 S.Ct. 164, 82 L.Ed. 204; . . ."

Phillips v. *United States*, 212 F.2d 327, 335 (8th Cir. 1954). See also *Richardson* v. *Markley*, 339 F.2d 967, 969 (7th Cir.), cert. denied, 382 U.S. 851 (1965) and *Hyser* v. *Reed*, 318 F.2d 225, 238 (D.C. Cir.), cert. denied sub nom *Thompson* v. *United States Board of Parole*, 375 U.S. 957 (1963), both holding that parole revocation is not a part of the criminal process.

Finally, we are moved to comment, as did the Sixth Circuit in *Rose* v. *Haskins*, supra, that if changes are to be made in the prison disciplinary system of granting and revoking paroles, such matters should be altered at the legislative and not the judicial level. The legislature, and not the courts, are equipped to not only require changes in the administration of prison and parole management, but to establish the machinery for the effectuation of such procedural alterations.

In our opinion, federal courts should not encroach into areas which have traditionally been matters of state concern. The operation of state penological systems, absent

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[11] Note that in *Alexis* v. *Turner*, 422 F.2d 214 (10th Cir.), cert. denied, 399 U.S. 916 (1970), the court reiterated its earlier position that *Mempa* is not applicable to parole revocation proceedings which are not a part of the sentencing process. Id. at 218. However, in this same case, the court afforded relief to one of the appellees who claimed he had been denied assistance of counsel in the *judicial* proceedings that had resulted in the revocation of his *probation*. The court held that this denial was a clear abuse of a federal constitutional right. Id. at 220-21.

flagrant violations of constitutional guarantees, are within the domain of state interest. *Williams* v. *Patterson*, 389 F.2d 374 (10th Cir. 1968). Intrusions into this area by requiring the states to provide a hearing as a prerequisite to an effective revocation of parole, in all cases, and regardless of the circumstances, obviously would increase the business of already overburdened state and federal courts. Such interference would, in our considered judgment, also serve as a deterent to the goal of fostering and improving harmonious state-federal relations. It would, in our opinion, be contrary to the basic principle of comity between the federal and state governments. Apropros here is the observation by the Supreme Court that this notion of comity is:

> "a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways."

Younger v. *Harris*, . . . U.S. . . . (February 23, 1971).

In holding that the Due Process Clause of the Fourteenth Amendment does not require that a hearing be granted on revocation of parole, we note that our decision conforms with those of the various federal courts of appeal which have held that certain procedural safeguards do not extend to parole proceedings as a requirement of constitutional due process. *Allen* v. *Perini*, 424 F.2d 134 (6th Cir.), cert. denied, 400 U.S. 906 (1970); *Rose* v. *Haskins*, supra; *Eason* v. *Dickson*, 390 F.2d 585 (9th Cir.), cert. denied, 392 U.S. 914 (1968); *Williams* v. *Dunbar*, 377 F.2d 505 (9th Cir.); cert. denied, 389 U.S. 866 (1967); *Hyser* v. *Reed*, supra; *Richardson* v. *Markley*, supra; *Johnson* v. *Tinsley*, 234 F.Supp. 866 (D. Colo.), aff'd. 337 F.2d 856 (10th Cir. 1964). Cf. *Douglas* v. *Sigler*, supra; *Mead* v. *California Adult Authority*, 415 F.2d 767 (9th Cir. 1969); *Earnest* v. *Willingham*, 406 F.2d 681 (10th Cir. 1969).

Finally, we recognize that the Supreme Court has on several occasions declined the opportunity to pass upon this issue. As recently as November 9, 1970, certiorari

was denied in *Allen* v. *Perini*, supra, in which the Sixth Circuit reaffirmed the position taken in *Rose* v. *Haskins*, supra, which is directly contrary to the contentions which appellants have presented to our court.

For all of the foregoing reasons, the orders of the district court are affirmed.

Our mandate shall issue forthwith.

LAY, Circuit Judge, with whom HEANEY and BRIGHT, Circuit Judges, concur, dissenting:

The Fourteenth Amendment to the Constitution of the United States reads in part "Nor shall any state deprive any person of life, liberty or property, without due process of law." This clause is unambiguous on its face. Its plain meaning requires notice of the charges or an opportunity to be heard before a state may deprive the liberty of any person.

Under Iowa law a parolee may be arrested, without notice of the fact that he will be returned to prison, without notice as to why he is being returned to prison, and without an opportunity to be heard in defense of the charge. The state's hypothesis is that due process is not required in the setting of parole revocation. A literal reading of the Constitution makes this postulate difficult to understand. A parolee is a "person" within the meaning of the due process clause. It is the "state" which revokes the parole status. Therefore, the only words which could possibly exempt the parolee from the operation of the Fourteenth Amendment are "deprive" and "liberty." These are not complex words with ambiguous meanings. It is true that parolee lives in society with more restrictions than other citizens, that his is a "conditional" liberty. However, in a sense every person's liberty is conditional on abiding by the rules of law. To reason that a parolee who is returned to the gray perimeter of prison walls is not "deprived" of "liberty," approaches the realm of judicial sophistry.

Such provincial and stunted rationalizations cannot square with words of the Constitution. Since logic and justice do not mandate the denial of due process to a parolee I am able to assess its denial in only one light. The denial of due process in parole revocation simply

mirrors society's overall attitude of degradation and defilement of a convicted felon.[1] It is said 20th Century Commentary that society views the convicted felon as a social outcast. He has done wrong, so we rationalize and condone punishment in various forms. We express a desire for rehabilitation of the individual, while simultaneously we do everything to prevent it. Society cares little for the conditions which a prisoner must suffer while in prison;[2] it cares even less for his future when he is released from prison.[3] He is a marked man. We tell him to return to the norm of behavior, yet we brand him as virtually unemployable; he is required to live with his normal activities severely restricted[4] and we react with sickened wonder and disgust when he returns to a life of crime.

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[1] Denial of due process in the parole revocation of a parolee falls far short of the ideals expressed in the President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Corrections 83 (1967):

> "A first tenet of our governmental, religious, and ethical tradition is the intrinsic worth of every individual, no matter how degenerate. It is a radical departure from that tradition to subject a defined class of persons, even criminals, to a regime in which their right to liberty is determined by officials wholly unaccountable in the exercise of their power. . . ."

[2] Cf. Governor Scott, "The Bar that Improves the 'Bars': A Plea for Prison Reform in North Carolina," *Judicature*, March 1971 p. 220; see also *Holt* v. *Sarver*, 309 F.Supp. 362 (E.D. Ark. 1970), appeal pending.

[3] A recent cover story in *Time* Magazine on the unhappy state of our correctional system pointed out: "Even though two-thirds of all offenders are on parole or probation, they get the least attention: 80% of the U. S. correctional budget goes to jails and prisons . . . Only about 20% of the country's correctors work at rehabilitation . . ." *Time* Magazine, Jan. 18, 1971, "The Shame of the Prisons" p. 53.

[4] See Dawson, *Sentencing: The Decision as to Type, Length, and Conditions of Sentence*, The Report of the American Bar Foundation's Survey of the Administration of Criminal Justice in the United States, p. 367 (1969) [hereinafter cited as *Sentencing*]:

> "The primary purpose of parole conditions is to maximize the parole officer's control over the parolee's behavior. As a result, parole conditions tend to be numerous and to touch upon many aspects of the parolee's life, some of which are only remotely related to the causes of his criminality. The violation of many of these conditions usually does not indicate a failure of the parolee to adjust to community life or an imminent danger to society, but indicates instead a normal pattern of behavior well within that expected of usually law-abiding persons."

If social values and goals be germane to the legal issue, the state sustains no valid governmental policy in such treatment. The cliche that "society breeds crime" is not irrelevant to the discussion. But the judiciary can only be interested in social values which are compatible within the requirements of the Constitution. And there should be little doubt that the Constitution clearly prohibits the summary imprisonment of any man without due process of law. Justice Harlan recently wrote for the Supreme Court in *Boddie* v. *Connecticut*, . . . U.S. . . . (1971):

> "Early in our jurisprudence, this Court voiced the doctrine that '[w]herever one is assailed in his person or his property, there he may defend,' *Windsor* v. *McVeigh*, 93 U.S. 274, 277 (1876). See *Baldwin* v. *Hale*, 1 Wall. 223 (1863); *Hovey* v. *Elliott*, 167 U.S. 409 (1897). The theme that 'due process of law signifies a right to be heard in one's defence,' *Hovey* v. *Elliott*, supra, at 417, has continually recurred in the years since *Baldwin*, *Windsor*, and *Hovey*. Although '[m]any controversies have raged about the cryptic and abstract words of the Due Process Clause,' as Mr. Justice Jackson wrote for the Court in *Mullane* v. *Central Hanover Tr. Co.*, 339 U.S. 306 (1950), 'there can be no doubt that at a minimum they require that deprivation of life, liberty, or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.' Id., at 313."

The very minimum standard of due process requires notice to the parolee of the reason for the revocation of his parole and an opportunity for him to be heard in resistance of the revocation. Cf. *Townsend* v. *Burke*, 334 U.S. 736 (1948).[5] We recently said:

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[5] The minimal requirements of notice of the charge and an opportunity to be heard provide the safeguard to abuse of revocation. Studies have shown that many paroles have been revoked on recommendations of parole officers because of the parolee's *alleged* involvement in a new crime. Rather than take the time, the expense and the possibility that the parolee may be found innocent of the new crime, the parolee is shunted back to prison for a technical reason. See *Sentencing*, supra, p. 362.

As observed in a recent article in *Time* Magazine, supra, p. 53:

> "Even parole supervision is often cursory and capricious. Many

> "Every citizen . . . is entitled to be substantively informed as to any governmental action which may affect his liberty or life. No governmental procedure may stand which fails to provide such information. To be both fairly and timely advised is fundamental to the basic concepts of due process. 'Clandestine due process' has never found favor or constitutional basis in courts of law. As this court said in United States v. Owen, 415 F.2d 383 (8 Cir. 1969): 'Inherent in the most narrow view of due process is the right to know of adverse evidence and the opportunity to rebut its validity and relevance. *Chernekoff* v. *United States*, (9 Cir. 1955) 219 F.2d 721.'" *Id.* at 388." *United States* v. *Cummins*, 425 F.2d 646, 649, (8 Cir. 1970).

Accord, *Gonzales* v. *United States*, 348 U.S. 407 (1955); *Simmons* v. *United States*, 348 U.S. 397 (1955); *Sicurella* v. *United States*, 348 U.S. 385 (1955); *United States* v. *Nugent*, 346 U.S. 1 (1953); cf. *Oestereich* v. *Selective Service Bd.*, 393 U.S. 233, 243 n. 6 (1968) (Harlan, J., concurring). Recent decisions have found a denial of due process to state prisoners whose paroles had been revoked without notice or an opportunity to be heard with counsel. See *Goolsby* v. *Gagnon*, . . . F.Supp. . . . (E.D. Wisc., Feb. 9, 1971); *Hester* v. *Craven*, . . . F.Supp. . . . (C.D. Cal., Feb. 17, 1971); *State ex rel. Menechino* v. *Warden*, . . . N.Y.2d . . . (N.Y. Ct. App., Jan. 13, 1971). Cf. *Menechino* v. *Oswald*, 430 F.2d 403 (2 Cir. 1970) and *Sostre* v. *McGinnis*, . . . F.2d . . . (2 Cir., Feb. 24, 1971) (Part VI).

These decisions have relied strongly on the reasoning of *Mempa* v. *Rhay*, 389 U.S. 128 (1967), where the Court held that due process is required in probation revocation proceedings on deferred sentencing. The Seventh Circuit, in a distinguished court composed of Mr. Justice Clark,

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parole agents handle more than 100 cases; one 15-minute interview per man per month is typical. The agents can also rule a parolee's entire life, even forbid him to see or marry his girl, all on pain of reimprisonment—a usually unappealable decision made by parole agents, who thus have a rarely examined effect on the repeater rate. To test their judgment, Criminologists James Robison and Paul Takagi once admitted ten typothetical parole-violator cases to 316 agents in California. Only five voted to reimprison all ten men; half wanted to return some men but disagreed on which ones."

Retired, and Judges Cummings and Kerner, recently held that due process is required on revocation of probation proceedings without regard to whether the sentence was deferred. *Hahn* v. *Burke*, 430 F.2d 100 (7 Cir. 1970). The Fourth Circuit has also applied the principles of *Mempa* to probation revocation. *Hewett* v. *North Carolina*, 415 F.2d 1316 (4 Cir. 1969). The reasoning of these cases is controlling here. As the majority indicates, however, some courts have denied the claim of constitutional infringement. Most courts which so held rendered their opinion prior to the Supreme Court's decision in *Mempa*. Analysis of those decisions, and the majority opinion, demonstrates their reliance on traditional arguments which have been largely undermined by recent decisions.

RIGHT PRIVILEGE DOCTRINE

It is argued that the granting of parole is a matter of grace which is strictly in the discretion of the parole board; so that the parolee is not prejudiced as to any *right* upon revocation. While there may not be a "right" to parole or any other discretionary "privilege" in the first instance, see *Menechino* v. *Oswald*, supra, once the discretion is exercised and the privilege granted the entitlement cannot be divested in a manner inconsistent with the requirements of due process. See *Goldberg* v. *Kelly*, 397 U.S. 254, 262-263 (1970). As the Supreme Court pointed out in *Goldberg*, there are situations in which the governmental interest involved outweighs the private interest. However, these situations usually involve an emergency in which the danger to the public health or safety is imminent.[6]

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[6] See R. O'Neil, "Of Justice Delayed And Justice Denied: The Welfare Prior Hearing Cases," 1970 Supreme Court Review 161, 169:

> "There have been instances, as the majority opinion noted, in which a constitutional right to be heard has been postponed until after the completion of the contested action. *But the circumstances justifying deferral of a conceded right to notice, personal appearance, and confrontation, are highly unusual. There are the classic 'emergency' cases*—food is about to spoil and must be kept from grocers' shelves; a fraud is about to be perpetrated on unsuspecting securities purchasers; or a professional licensee is continuing to offer his services to trusting clients after having perpetrated malpractice. *In these situations, the reason for acting now and hearing later are incontestable. Moreover, there is usually an adequate remedy after the fact; if the victim of summary action*

In the context of probation revocation, the Fourth Circuit has refuted the right privilege distinction:

> "We are not impressed by the argument that probation is a 'mere' privilege, or a matter of grace, rather than a right and that, therefore, various constitutional mandates, including the right to counsel, should be held to be inapplicable. Even if a distinction exists between the components of the right-privilege dichotomy, when a state undertakes to institute proceedings for the disposition of those accused of crime it must do so consistently with constitutional privileges, even though the actual institution of the procedure was not constitutionally required. See, *e.g.*, *Griffin* v. *Illinois*, 351 U.S. 12, 18, 76 S.Ct. 585, 100 L.Ed. 891 (1956) (plurality opinion)." *Hewett* v. *North Carolina*, supra, at 1322-1323.

In his dissenting opinion in *Rose* v. *Haskins*, 388 F.2d 91, 97, 100-101 (6 Cir. 1968), Judge Celebrezze points out the weakness of the right privilege distinction:

> "In *Fleenor* v. *Hammond*, 116 F.2d 982 (6th Cir. 1941), supra, this Court granted that pardon was a matter of grace but pointed out that once pardoned the person pardoned was entitled to his liberty: a liberty that could be forfeited only by his breach of the conditions of the pardon. As indicated above, the act-of-grace assumption need not be so summarily granted, but, even if the liberty given the parolee is considered a privilege, the *Fleenor* decision is more commensurate with the protection given other so-called privileges by recent Supreme Court decisions. Cf. Greene v. McElroy, 360 U.S. 474, 79 S.Ct. 1400, 3 L.Ed.2d 1377 (1959)."

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later prevails, he can be made whole or nearly whole through money damages.

"Apart from these emergency situations, there seems almost a general presumption that one who is constitutionally entitled to be heard at all should be heard before the change in status occurs." (Emphasis ours.)

Mr. O'Neil further comments:

"These distinctions revive the specter of the long interred right-privilege dichotomy. For some years the Supreme Court has deliberately avoided these labels and their irrational effects." *Id.* at 179.

Judge Celebrezze thoroughly summarizes the law in this area and then points out:

See also *State ex rel. Menechino* v. *Warden*, supra.[8]

"In this country most interests of a citizen are protected from direct government action that does not conform to due process of law. Of course, due process has a flexible context; what process is due a person in one situation may not be due him in another, and a cynic might say that if due process has no effect, it does not apply. But to say that an interest is a privilege, therefore, constitutional rights do not attach only obscures the reasoning by which a decision is reached that due process considerations must yield to policies of countervailing importance. The method of reaching such a decision was indicated in *Cafeteria:*

> 'As these and other cases make clear, consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action.' 367 U.S. at 895, 81 S.Ct. at 1748.

"The 'precise nature of the government function' involved in the revocation of a parole is the determination of an adjudicatory fact: Has the parolee or has he not violated the conditions of his parole? The difficulty arises because all of the functions of administering a parole system are the responsibility of the same agency, which grants parole, supervises parole, and revokes parole. Many of the functions involve a certain amount of expertise in the application of principles of behavioral and sociological sciences, and some fears have been expressed that judicial interference in one function will disrupt the whole scheme.

"For the most part those fears have been supported by nothing more than the untutored intuition of the person expressing them; so they should be closely scrutinized in order to determine their validity." 388 F.2d at 101.

[8] Professor Davis, 1 Administrative Law Treatise § 7.11, p. 455 (1958), observes that "the courts are increasingly recognizing that the use of the privilege doctrine is often unsound." He further points out:

> "But if a right is an interest which is legally protected, and if a court gives legal protection to a privilege, does not the court turn the privilege into a right? Even if the answer to this question is yes, the proposition may still be perfectly sound that one who lacks a 'right' to a government gratuity may nevertheless have a 'right' to fair treatment in the distribution of the gratuity. In tort law, the accident victim has no right to be helped by the passerby, but he has a right to careful and proper treatment by the passerby who volunteers to help. Like the passerby, the government may refuse altogether to help applicants for gratuities, but it cannot provide the help improperly; it cannot grant or withhold on the basis of racial or religious discrimination. The government could deny altogether the admission of Oklahoma to the Union, but it could not admit Oklahoma improperly, that is, with a condition that its capital must be at a particular place. A state can deny altogether a permit to a foreign corporation to do local business, but it cannot grant the privilege improperly, that is, on condition that suits

BALANCING OF INTERESTS.

In *Goldberg* v. *Kelly*, supra, the Supreme Court said:

> "The extent to which procedural due process must be afforded the recipient [of governmental gratuity] is influenced by the extent to which he may be 'condemned to suffer grievous loss,' *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring), and depends upon whether the recipient's interest in avoiding that loss outweighs the governmental interest in summary adjudication. Accordingly, as we said in *Cafeteria & Restaurant Workers Union* v. *McElroy*, 367 U.S. 886, 895 (1961), 'consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as the private interest that has been affected by governmental action.' See also *Hannah* v. *Larche*, 363 U.S. 420, 440, 442 (1960)." 397 U.S. at 262-263.[9]

The majority opinion argues that the government's interest in summary revocation outweighs the parolee's interest in procedural rights, because: (1) the full panoply of criminal rights would overburden the administrative hearing process; (2) a hearing would interfere with the *parens patriae* relationship and thereby inhibit rehabilitation; (3) the prospect of full trials upon revocation will

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against the corporation shall not be removed to a federal court." § 7.12, p. 456.

See also Note, "Re-Arrest of Parolees: Constitutional Considerations," 46 Wash. L. Rev. 173, 178 (1970).

[9] In *Greene* v. *McElroy*, 360 U.S. 474, 496 (1959), the Court observed:

> "Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots."

deter parole boards from granting paroles in the first instance.

1. The majority expresses concern that "the full panoply of criminal rights" will unduly tax the administrative process. Neither the petitioners nor any of the authorities that recognize procedural due process have argued that a parolee is entitled to the "full panoply" of rights. Fact-finding processes can be flexible without being basically unfair. An adequate system can be developed which is something less than a full trial. *Boddie* v. *Connecticut*, ... U.S. ... (1971). And see *Davis*, supra, § 7.16, pp. 179-180 (1965 Supp.). The new Washington state procedure, for example, provides that a parolee accused of a violation must be served with the charges of the violation and shall be advised of his right to an on-site revocation hearing (which he may waive). Wash. Rev. Code Ann. §§ 9.95.120 et seq. (1969-70 Supp.). There is no indication that states which have adopted hearings for parole revocation have experienced significant difficulties.[10] What little data is available does not justify alarm as to the effect of due process on revocation proceedings.[11] Experience in states which provide for parole revocation hearings and permit the parolee to retain counsel indicates that fears of havoc and ruin are exaggerated, if not unwarranted.[12] Further, there is no indication that the right of federal parolees to a hearing upon revocation, 18 U.S.C.A. § 4207, has in any way diminished the efficiency of the federal parole board. Professor Kadish has made an incisive observation in this regard:

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[10] See S. Rubin, "Developments in Correctional Law," *Crime and Delinquency* 185 (April 1970).

[11] See generally, B. Jacob and K. Sharma, "Justice After Trial: Prisoners' Need for Legal Services in the Criminal-Correctional Process," 18 Kan. L. Rev. 493, 540-550 (1970); R. Sklar, "Law and Practice in Probation and Parole Revocation Hearings," 55 J. Crim. Law 175, 197 (1964); S. Kadish, "The Advocate and the Expert—Counsel in the Penal Correctional Process," 45 Minn. L. Rev. 803, 832-841 (1961).

[12] The majority's conclusory apprehension is not supported by a study of the parole revocation system in Michigan, which revealed:

> "The number of parolees returned to prison as technical violators who elect to have a public hearing has been small since the law providing for such hearings was passed in 1937. Typically, five or six such hearings are held each year. The largest number of hearings held in a single year has been ten. The small number of public hearings is partially due to the care taken by parole officers in ascertaining the facts of a violation

"The problems of overburdened parole boards would appear remediable by measures directed to the problem rather than by the pursuit of measures which render the work of the boards less just and less adequate." 45 Minn. L. Rev. at 837-838.

2. I would have thought that *In re Gault*, 387 U.S. 1 (1967), closed the door to the *parens patriae* argument.[13] It is a fiction to view the parole board and the parolee as having an identity of interest.[14] The majority refers to

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and their practice of refraining from initiating revocation procedures if the facts do not support the action. Most parolees brought before the board on charges of technical violations are quick to plead guilty to the counts cited against them." *Sentencing*, supra, at 355.

[13] *Gault* addresses itself to the *parens patriae* argument in the context of juvenile delinquency hearings:

"These results [rehabilitation] were to be achieved, without coming to conceptual and constitutional grief, by insisting that the proceedings were not adversary, but that the state was proceeding as *parens patriae*. The Latin phrase proved to be a great help to those who sought to rationalize the exclusion of juveniles from the constitutional scheme; *but its meaning is murky and its historic credentials are of dubious relevance*. The phrase was taken from chancery practice, where, however, it was used to describe the power of the state to act *in loco parentis* for the purpose of protecting the property interests and the person of the child. *But there is no trace of the doctrine in the history of criminal jurisprudence.*" 387 U.S. at 16. (Emphasis ours.)

The Court went on to point out that "proceedings involving juveniles were described as 'civil' not 'criminal' and therefore not subject to the requirements which restrict the state when it seeks to deprive a person of his liberty. . . . The constitutional and theoretical basis for this peculiar system is—to say the least—debatable." *Id.* at 17. "Failure to observe the fundamental requirements of due process has resulted in instances, which might have been avoided, of unfairness to individuals and inadequate or inaccurate findings of fact and unfortunate prescriptions of remedy." *Id.* at 19-20. The parallel to parole revocation procedures is obvious.

[14] Professor Davis topically refutes the contention that the parole board and the parolee have an identity of interest which is interrupted by judicial procedural safeguards. In discussing *Hyser v. Reed*, 318 F.2d 225 (D.C. Cir. 1963), cert. denied 375 U.S. 957 (1963), he says:

"The reasons for rejecting these various arguments of the majority are persuasive. The court's assertion that the prisoner and the Board have a 'genuine identity of interest' may have some plausibility concerning the Board's exercise of discretion after the Board has found the facts, but it has no reality at the point when the Board is finding facts that the prisoner is specifically denying; at that crucial point the interests are obviously opposed, not identical. Even if the Board 'occu-

the detrimental effect due process would have on rehabilitation. However, there is no concrete evidence to substantiate this assertion, just as the evidence does not indicate that the present system is particularly effective in rehabilitating parole violators. If the *absence* of due process has any effect on rehabilitation, however, it is most likely to be detrimental. Arbitrary action by officers of the law is more likely to breed resentment and disrespect than rehabilitation. The New York Court of Appeals recognized the cogency of the argument:

> "(T)he parole system is an enlightened effort on the part of society to rehabilitate convicted criminals. Although few circumstances could better further that purpose than a belief on the part of such offenders in a fair and objective parole procedure, hardly anything could more seriously impede progress toward that important goal than a belief on their part that the law's machinery is arbitrary, too busy or impervious to the facts. The desired end can become a reality only by requiring obedience to the demands of due process and granting parolees a hearing at which they will be represented by counsel." *State ex rel. Menechino* v. *Warden*, 267 N.E.2d 238, 243-44 (1971).[15]

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pies the role of parent withdrawing a privilege,' one may wonder whether a parent (or the Board) is acting justly by unnecessarily denying the child (or the parolee) a chance to explain or rebut the evidence against him. If the Board does not 'adjudicate' when it finds facts from conflicting evidence, then the term 'adjudicate' has lost its usual meaning. The theory that parole is a 'part of' 'rehabilitation' is a theory that may have promise for the future, but it is not the only theory that governs the thought and action of parole officers. One has only to interview members of the Federal Parole Board to learn that ideas of deterrence and retribution still have great force." Davis, supra, § 7.16, p. 175 (1965 Supp.)

[15] The dissent in the state decision of *Mempa*, which position was ultimately adopted by the Supreme Court, also underlines this fact:

> "In fairness to any probationer, the procedures utilized should be designed to avoid the possibility, however remote, of revocations founded on accusations arising out of mistake, prejudice and caprice. The threat of arbitrary or whimsical commitment does not tend to encourage either cooperation or successful rehabilitation. Reformation can best be accomplished by fair, consistent, and straightforward treatment of the individual." *Mempa* v. *Rhay*, 416 P.2d 104, 113 (Wash. 1966) (Hamilton, J. dissenting).

The point is that in *correctional* penology there is no arbitrary right to revoke parole. In effect, society tells the parolee that he may remain at liberty if he stays out of trouble. If the parolee does abide by the rules and his parole is revoked, without notice of the reasons or an opportunity to be heard, his resulting attitude of resentment and betrayal is not likely to improve his outlook on society and its rules. Arbitrary revocation can actually put a negative incentive on cooperating with his parole officer.

3. It is further argued that if due process is required at revocation proceedings there will be fewer paroles granted which will retard rehabilitation in the larger sense. The district court for the Eastern District of Wisconsin recently rejected this argument as unwarranted speculation and mere assertion since the "state has not shown in precisely what manner the burden of a hearing prior to revocation would lead to fewer paroles." *Goolsby* v. *Gagnon*, . . . F.Supp. . . ., 8 Cr.L. 2403 (E.D. Wisc. Feb. 9, 1971). In addition, this contention casts unwarranted aspersions on the dedication of parole boards. It assumes that parole board members would react vindictively to spite the legal process. It assumes that parole boards would deny paroles to otherwise deserving prisoners and thereby delay their optimum rehabilitation merely to save themselves a little time.[16]

On balance, it appears that there is no really substantial state interest in summary adjudication other than

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See also Note, "Re-Arrest of Parolees: Constitutional Considerations," 46 Wash. L. Rev. 175, 179 (1970); Comment, "Due Process and Revocation of Conditional Liberty," 12 Wayne L. Rev. 638, 650 (1966).

[16] Practical considerations might further indicate that the predicted result of fewer paroles will not come to pass. The sheer weight of numbers might prevent any radical departure from the present level of paroles granted. With prisons grossly overcrowded and understaffed for proper correction and rehabilitation, it seems unlikely that a parole board would want to, or could if it wanted to, cease granting paroles and add to the logjam merely to serve their administrative convenience. Indeed, one commentator has noted that aside from rehabilitation, the primary purpose of parole is probably economics. Parole boards are often concerned with overcrowded prisons and the cost of feeding and clothing prisoners. Therefore, if a prisoner has met the minimum requirements and the chance for recidivism is not high, he will probably be released on parole. These financial considerations might also explain why parole violators are often reparoled. Comment, supra, 12 Wayne L. Rev. at 640.

that of preserving the status quo. The individual's interest in maintaining his liberty, however restricted, his interest in maintaining whatever reputation he might have regained in the community, his interest in avoiding sudden and possibly disasterous interruptions in his home life and in his employment, coupled with society's interest in rehabilitating ex-convicts rather than embittering them through arbitrary and unfair treatment, all outweigh the state's minimal interest in summary adjudication.

PROBATION PAROLE DISTINCTION

The principle of *Mempa* v. *Rhay*, *Hahn* v. *Burke*, and *Hewett* v. *North Carolina*, supra, providing that there is a right to due process at probation revocation proceedings, is clearly applicable to parole revocations also:

> "The principle which underlies the decision in *Mempa* is sufficiently broad to encompass the revocation of parole as well as of probation. In both, the decision to deprive an individual of his liberty turns on factual determinations, and we would say, as did the Supreme Court in the *Mempa* case (389 U.S., at p. 135), that 'the necessity for the aid of counsel in marshaling the facts, introducing evidence of mitigating circumstances and in general aiding and assisting the defendant to present his case * * * is apparent.'" *State ex rel. Menechino* v. *Warden*, ... N.Y.2d ... (N.Y. Ct. App. Jan. 13, 1971).

In *Warren* v. *Michigan Parole Board*, 23 Mich. App. 754, 179 N.W.2d 664, 670 n. 22 (1970), the court observed:

> "We are mindful of the peculiar status of the paroled prisoner. Technically he occupies a different place in the law than the probationer. . . . Yet when the parolee and the probationer are accused of violations of their conditional status, the differences between them assume insignificant proportions.
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> "Of paramount concern to both of them is the impending loss of their liberty. It simply is not reasonable to suggest that in the face of this common threat to a constitutionally protected interest—liberty—the parolee should be denied procedural safeguards now freely available to the probationer.

> "This correspondence [discretion of trial court to determine minimum sentence and discretion of parole board to determine length of parole] serves to emphasize the incongruity of refusing to apply to parole revocation procedures the constitutional guarantees which accompany deferred sentencing."

In *Commonwealth* v. *Tilson*, 438 Pa. 328, 249 A.2d 549 (1969), the Pennsylvania Supreme Court held that after *Mempa* v. *Rhay*, supra, to distinguish probation and parole "is completely untenable." [17]

CONSTRUCTIVE CUSTODY THEORY

It is urged that a parolee is still in the constructive custody of prison authorities even though not in their physical custody. In effect, it is said parole is an extension of the prison walls and therefore, judicial involvement in parole revocation proceedings is an unwarranted interference with "prison discipline."

This proposition seems to be based on the assumption that an incarcerated prisoner has no rights. However, it is settled that prison officials may not interfere with a prisoner's basic constitutional rights. See e.g. *Cooper* v.

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[17] Both parole and probation "provide for the return of a convicted criminal to society under limited conditions, with failure to conform to such conditions resulting in a loss of the conditional liberty status and reincarceration." Comment, supra, 12 Wayne L. Rev. at 639. Mr. Sol Rubin, Counsel for the National Council on Crime and Delinquency, has also pointed to the similarities. "In fact, the status of the probationer and parolee are in the strongest correspondence—in the granting of the status, being dependent on the discretion of judge or board; in the nature of the conditions of release (more or less—or exactly—identical); in the process of revocation; and even in the decision as to what their continued status will be, whether continued conditional release or incarceration." S. Rubin, "Due Process Is Required in Parole Revocation Proceedings," June 1963 *Federal Probation* 42, at 45.

See also *Goolsby* v. *Gagnon*, . . . F.Supp. . . . , 8 Cr. L. 2403 (E.D. Wisc., Feb. 9, 1971), where Judge Reynolds followed the rationale of *Hahn* v. *Burke*, supra, and held that there is a constitutional right to due process in a state parole revocation hearing, including the right to a hearing on the factual basis of the revocation and the right to the assistance of counsel. The court held: "The central fact, which applies to both probation and parole revocations, is that revocation is the event which operates to deprive a man of his liberty. . . . Hence, I find no substantial degree of difference between the 'grievous loss' to be suffered by a probation facing revocation and a parolee facing revocation which would dictate reaching a different result with regard to the requirement of a hearing." . . . F.Supp. at . . . .

Pate, 378 U.S. 546 (1964). Prison discipline may not impair a prisoner's access to the courts. See *Johnson* v. *Avery*, 393 U.S. 483 (969); *Ex parte Hull*, 312 U.S. 546, 549 (1941). In the recent Second Circuit opinion of *Sostre* v. *McGinnis*, . . . F.2d . . ., . . . (2 Cir. Feb. 24, 1971), Judge Kaufman observed:

> "In thus rejecting Judge Motley's conclusions, however, we are not to be understood as disapproving the judgment of many courts that our constitutional scheme does not contemplate that society may commit lawbreakers to the capricious and arbitrary actions of prison officials. *If substantial deprivations are to be visited upon a prisoner, it is wise that such action should at least be premised on facts rationally determined.* This is not a concept without meaning. *In most cases it would probably be difficult to find an inquiry minimally fair and rational unless the prisoner were confronted with the accusation, informed of the evidence against him*, see *Armstrong* v. *Manzo*, 380 U.S. 545, 552 (1965); *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), *and afforded a reasonable opportunity to explain his actions.*" (Emphasis ours.)

Judge Blackmun (now Mr. Justice Blackmun) thoroughly pointed out the traditional position of the Eighth Circuit in *Jackson* v. *Bishop*, 404 F.2d 571 (8 Cir. 1968). This court's position has been that while it is reluctant to interfere with a prison's internal discipline, "a prisoner of the state does not lose all his civil rights during and because of his incarceration. In particular, he continues to be protected by the due process and equal protection clauses which follow his through the prison doors." *Id.* at 576. See also *Meola* v. *Fitzpatrick*, . . . F.Supp. . . ., 8 Cr. L. 2404 (D. Mass., Feb. 8, 1971), holding that a state violated the prisoner's Fourteenth Amendment rights by imposing prison disciplinary measures which substantially affected his interests (forfeiture of earned good time) so that he was entitled to procedural safeguards, "*at least the elementary ones of notice of the charges against him and an opportunity to reply to them.*" (Emphasis ours.) Accord, *Carothers* v. *Follette*, 314 F.Supp. 1014 (S.D. N.Y.

1970); *Sostre* v. *Rockefeller*, 312 F.Supp. 863 (S.D. N.Y. 1970).[18]

Mr. Justice Jackson, dissenting in *United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537 (1950), observed:

> "Security is like liberty in that many are the crimes committed in its name. . . . The plea that evidence of guilt must be secret is abhorrent to free men, because it provides a cloak for the malevolent, the misinformed, the meddlesome, and the corrupt to play the role of the inforcer undetected and uncorrected." *Id.* at 551.

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[18] Aside from the error of the unstated premise of the majority's theory of constructive custody, the commentators have amply illustrated the fictional basis of the theory of the "extension of the prison walls."

> "Equating actual and constructive custody seems unrealistic. While the parolee is inhibited somewhat by the conditions of his parole, which commonly include restrictions on association and travel, it cannot be seriously contended that these restrictions are comparable to the restrictions imposed upon an actual prisoner." Note, supra, 46 Wash. L. Rev. at 176-177.

Another observer argues that the custody theory is an attempt to attach unconstitutional conditions to the grant of a privilege. W. White, "The Fourth Amendment Rights of Parolees and Probationers," 31 U. Pitt. L. Rev. 167, 178-181 (1969). Deeming the constructive custody theory "at most an embellishment that should not be dispositive of the constitutional questions," another writer has pointed out:

> "This theory is dependent upon the fiction that conditional liberty does not liberate the prisoner but merely 'pushes back the prison walls' . . . . This fiction, however, is not a satisfactory basis for negating the applicability of constitutional rights. It is obvious that as inhibited as the parolee may be, there is no comparison between the freedom he enjoys while on parole and imprisonment. Thus, the metaphorical *extension of prison walls-constructive custody theory* is an insufficient basis, by itself, for holding that conditional liberty is not circumscribed by constitutional protections. This theory like the contract theory is generally discussed after the court has made the right-privilege distinction and reached a 'no procedural due process' conclusion." Comment, supra, 12 Wayne L. Rev. at 646.

The author further argues that if the constructive custody theory is to be applied with logical consistency, then since the parolee is still technically in prison he *must* be given credit for parole time against his sentence, and yet this is not the case in practice. *Id.* at 647. Mr. Sol Rubin has also argued that abandoning the fiction of constructive custody would make parole laws more consistent with their rehabilitative purpose. June 1963 *Federal Probation* at 45.

Even an *alien* who has become a lawful resident of the United States cannot be deprived of due process of law, and though he may be subject to expulsion he is entitled to notice of the nature of the charge and a hearing at least before an executive or administrative tribunal. *Kwong Hai Chew* v. *Colding*, 344 U.S. 590, 596-597 (1953); *The Japanese Immigrant Case*, 189 U.S. 86, 100-101 (1903). See also Davis, supra, § 7.15.

CONTRACT THEORY

It is argued that parole is in the nature of a contract to which the parolee is a party. By having agreed to the terms of the parole, the parolee is in no position to complain about the lack of process in revocation. Any comparison with contract law is unrealistic. The "parties" are nowhere equal in bargaining strength and the parolee cannot object to provisions he thinks are unreasonable. The parole agreement is presented on a take it or leave it basis, and to a prisoner with the prospect of obtaining his freedom there is no reasonable choice. Courts reject such rationalizations when dealing with adhesive contracts in insurance law[19] and in equating the relationship of the consumer with the manufacturer in the field of product liability.[20] It is a strange anomaly to fictionalize its use when dealing with an individual's personal liberty.

Judge Celebrezze's dissent in *Rose* v. *Haskins*, supra, further points up the fallacy of the contract argument. He points out the erroneous historical basis for the argument and how these matters are determined by the public demand rather than the consent of the prisoner.

> "So a parole is not a 'contract' in the traditional sense of that word, and, if the theory only means that the State in fact attached such a condition to the parolee's freedom, the question remains whether the State can attach such a condition. For if the negative pregnant that is implicit in the contract theory is true (that if the parolee had not agreed to summary revocation he would have had the right to a hearing), then

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[19] See *American Service Mut. Ins. Co.* v. *Bottum*, 371 F.2d 6 (8 Cir. 1967).

[20] Cf. *Henningsen* v. *Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960).

that theory has recognized that a right to a hearing is inherent in the revocation situation. Waiver of such a valuable right is not to be lightly determined, and when the 'choice' of the parolee is to remain in prison or accept such a burdensome provision, the 'choice' to accept parole can hardly be termed a voluntary waiver of the right to a hearing. Therefore, the two legal theories advanced to justify the denial of a hearing have a dubious basis both in history and in logic." 388 F.2d at 100.

The Seventh Circuit recognized the fallacy of the contract argument and adopted the reasoning of Judge Celebrezze's dissent, pointing out that the parties do not enter the "contract" on an equal basis. *Hahn* v. *Burke*, supra, 430 F.2d at 104-105. See also Comment, "Rights Versus Results: Quo Vadis Due Process for Parolees," 1 Pac. L. J. 321, 338 (1970).

ADMINISTRATIVE PROCEEDING

Parole revocation is an administrative, rather than a judicial, proceeding; therefore, according to the majority opinion, it is not necessary to conduct the revocation with regular procedures or provide notice to the parolee. The Michigan Court of Appeals has recognized that "the artificial designation of certain proceedings as 'administrative' will not withstand judicial scrutiny where the challenged tribunal has the power to incarcerate the accused." *Warren* v. *Michigan Parole Board*, supra, 179 N.W.2d at 669-670 n. 20. Professor Kenneth Culp Davis, one of the leading authorities on administrative law, also points out that an "administrative" classification does not negate the need for a hearing: "When adjudicative facts are in dispute, our legal tradition is that the party affected is entitled not only to rebut or explain the evidence against him but also to 'confront his accusers' and to cross-examine them." Davis, supra, § 7.05 at p. 426.

HABEAS CORPUS ON ARBITRARY ABUSE

Although a prisoner is said to have no constitutional right to a hearing upon revocation of his parole, the majority opinion states that the parolee cannot be made the subject of "arbitrary" action. This is an attempt to ward

off evil spirits by tossing a dart into the fog. It smacks of self-contradiction. This seems to be a recognition of the potentially dangerous consequences of explicitly denying any legal recourse to parolees whose paroles are revoked without procedural safeguards. However, this is merely a precatory warning, since the effect of the decision is to emasculate any effort to prevent the parolee from being made the subject of arbitrary action.[21] At oral argument the state conceded, with logical consistency, that there is an arbitrary right to revocation without explanation or rational basis. If it is true that there is no constitutional right to a hearing on parole revocation, the inevitable logical corollary must be that the state's power to revoke is absolute. The majority's ambivalent stand is even more confusing here when one considers that the present case deals with prisoners' claims under petitions seeking writs of habeas corpus. The petitioners are seeking a hearing to challenge an arbitrary revocation of parole. The majority opinion paradoxically denies this opportunity by deferring to the state's adjudication that parole revocation is a matter of absolute discretion and cannot be challenged.[22]

The argument that habeas corpus can later be available comes too late to effectively prevent unlawful punishment. Cf. *Oestereich* v. *Selective Service Bd.*, supra; *Gutknecht* v. *United States*, 396 U.S. 295 (1969). Such a remedy is illusory when applied to an arbitrary parole revocation.

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[21] This is the same logical dilemma which Justice Brennan pointed out in his dissent to *Cafeteria & Restaurant Workers Union* v. *McElroy*, 367 U.S. 886, 901 (1961):

> "In sum, the Court holds that petitioner has a right not to have her identification badge taken away for an 'arbitrary' reason, but no right to be told in detail what the reason is, or to defend her own innocence, in order to show, perhaps, that the true reason for deprivation was one forbidden by the Constitution. This is an internal contradiction to which I cannot subscribe."

[22] The majority opinion refers to *Curtis* v. *Bennett*, 131 N.W.2d 1 (Iowa 1964), where the Iowa Supreme Court says that habeas corpus will lie where the parolee alleges that he is not the party intended, that the revocation is a forgery, or that the officials attempting to revoke are within authority. These matters deal with the state's *power* to act and do not meet the constitutional issues raised when authority is exercised in the manner provided by law. Also, these limitations are matters of mere expediency allowed by state law and do not attain constitutional propositions.

First the individual prisoner is taken summarily from private life and again regimented to one in a penitentiary. This is a drastic prerequisite to filing habeas corpus. Contrary to the spirit of the Great Writ, months or years may go by before a prisoner is given a hearing in a state court. State courts may well reason, as they have in the instant cases, that no hearing is ever necessary since the power of revocation is absolute. As in the instant cases, a hearing in the federal courts may be equally elusive. Clearly, habeas corpus fails to provide an adequate prophylaxsis where an individual's parole is wrongfully revoked. This is especially true where a simple explanation or presentation of facts might have demonstrated there was in fact no violation of parole.[23]

COMITY

The majority emphasizes that federal courts should show judicial deference to state rights and not intervene in areas which traditionally have been matters of state concern. The majority opinion relies on the recent case of *Younger* v. *Harris*, ... U.S. ..., (1971). I have no disagreement with the proposition that the doctrine of "comity" should deter federal interference on constitutional issues where the state has a *pending* opportunity to act. However, overlooked is that *Younger* and a companion case, *Perez* v. *Ledesma*, ... U.S. ... (1971), recognize that if the state court misses the constitutional mark there can be federal review "by certiorari or to appeal to this Court [the Supreme Court] or in a proper case on federal habeas corpus." 39 U.S.L.W. 4214, 4215 (U.S.

[23] Apropos is Mr. Justice Murphy's concurring statement in *Estep* v. *United States*, 327 U.S. 114, 131 (1946):

"There is something basically wrong and unjust about a juridical system that sanctions the imprisonment of a man without ever according him the opportunity to claim that the charge made against him is illegal. I am not yet willing to conclude that we have such a system in this nation. Every fiber of the Constitution and every legal principle of justice and fairness indicate otherwise. The reports are filled with decisions affirming the right to a fair and full hearing, the opportunity to present every possible defense to a criminal charge and the chance at some point to challenge an administrative order before punishment. Those rudimentary concepts are ingrained in our legal framework and stand ready for use whenever life or liberty is in peril."

Feb. 23, 1971). In the instant case the petitioners have exhausted their state remedies and *they are now here on habeas corpus*. All *Younger* and its companion case have set out to do is to require comity where a state court proceeding is already pending. *Younger, et al.*, did not mean we are to revert to 50 different applications of the Bill of Rights in deference to state's rights. *Younger* did not mean that a federal court must sit by and allow a state to misconstrue the federal Constitution. This is far from the result reached by the Supreme Court in the recent decisions of *Boddie* v. *Connecticut*, ... U.S. ... (1971); and *Wisconsin* v. *Constantineau*, ... U.S. ... (1971). The Iowa parole revocation proceedings are either within or without the Fourteenth Amendment. Deference to state adjudication is not relevant here. Judicial deference to state interests cannot change the nature of an unconstitutional proceeding.

In the preface of his recent book Professor Davis observes:

> "... [T]he greatest and most frequent injustice occurs at the discretion end of the scale, where rules and principles provide little or no guidance, where emotions of deciding officers may affect what they do, where political or other favoritism may influence decisions, and where the imperfections of human nature are often reflected in the choices made." *Discretionary Justice*, p. v (1969).

I think that wherever a state exercises arbitrary discretion to the detriment of individual liberty, the due process clause of the Fourteenth Amendment is still the applicable safeguard.

I would reverse and direct the district court to grant the writs of habeas corpus unless the state parole board grants an immediate hearing fully informing the petitioners of the charges made back in 1969 and allow petitioners to present evidence relevant to the denial of the charges.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

JUDGMENT
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 20328. September Term, 1970

JOHN J. MORRISSEY, #29739, *Appellant*, vs. LOU V. BREWER, Warden, *Appellee*.	Appeal from the United States District Court for the Southern District of Iowa.

[Filed Apr 21 1971, Robert C. Tucker, *Clerk*]

This Cause came on to be heard on the original files of the United States District Court for the Southern District of Iowa and briefs filed by the respective parties and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court that the order of the said District Court appealed from entered April 15, 1970, in this cause, be, and the same is hereby, affirmed. Mandate shall issue forthwith.

April 21, 1971

JUDGMENT
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 20425. September Term, 1970

G. Donald Boohier, #29509, *Appellant*, vs. Lee and O'Brien Counties, and the State of Iowa, *et al.*, *Appellees*.	Appeal from the United States District Court for the Southern District of Iowa.

[Filed Apr 21 1971, Robert C. Tucker, *Clerk*]

This Cause came on to be heard on the original files of the United States District Court for the Southern District of Iowa and briefs filed by the respective parties and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court that the order of the said District Court appealed from entered June 10, 1970, in this cause, be, and the same is hereby, affirmed. Mandate shall issue forthwith.

April 21, 1971

IN THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 20425.

G. DONALD BOOHER, #29509,
Appellant,

vs.

LEE AND O'BRIEN COUNTIES, AND THE STATE OF IOWA, *et al.*,
Appellees.

CASE NO. 20425
Appeal from the United States District Court for the Southern District of Iowa.

[Received May 27 1971 U.S. Court of Appeals
Eighth Circuit]

PETITION FOR REHEARING AND FOR THE ISSUANCE OF THE WRIT OF HABEAS CORPUS UPON THE MANDATE OF THE COURT ISSUED IN THIS CASE EN BANC ON APRIL 21, 1971

COMES NOW, G. DONALD BOOHER, APPELLANT AND PETITIONER, AND FOR CAUSE OF ACTION MOVES THE COURT TO ISSUE MANDATE IN THIS CASE UPON THE GROUNDS SET FORTH BY ITS DECISION OF APRIL 21, 1971, AS SET OUT ON PAGE'S FIVE (5) AND NINE (9) OF SAID OPINION, BY DIRECTING THE DISTRICT COURT OF IOWA, LOCATED AS THE FEDERAL DISTRICT COURT OF IOWA IN AND FOR THE SOUTHERN DISTRICT OF IOWA, CENTRAL DIVISION, DES MOINES, IOWA, FORTHWITH CAUSING THE WRIT OF HABEAS CORPUS TO ISSUE FORTHWITH SETTING THE APPELLANT'S AT LIBERTY FOR THE FOLLOWING REASONS, TO-WIT:

STATEMENT OF THE CASE

ON APRIL 29, 1966, APPELLANT PETITIONER G. DONALD BOOHER, WAS SENTENCED TO A TERM OF TEN (10) YEARS IN THE IOWA STATE PENITENTIARY LOCATED AT FORT MADISON, IOWA

FROM THE O'BRIEN COUNTY DISTRICT COURT OF IOWA, FOR VIOLATION OF SECTION 718.1 IOWA CODE 1962.

THE APPELLANT PETITIONER UNDER STATE STATUTE REQUIRED TO SERVE A PERIOD OF FOUR (4) YEARS EIGHT (8) MONTHS AND TEN (10) DAYS, IN THE CUSTODY OF THE OFFICE OF THE WARDEN, SUBJECT TO PAROLE AND A LOWER GRADE OF PUNISHMENT, AT ANY TIME AFTER COMMITMENT THEREOF.

YOUR APPELLANT PETITIONER SERVED A PORTION OF HIS TERM ON PAROLE UNDER THE CUSTODY OF THE WARDEN, FROM NOVEMBER 14, 1968 TO SEPTEMBER 24, 1969, WITHOUT CREDIT BY THE WARDEN FOR SUCH PERIOD OF THE TERM SERVED WHILE ON PAROLE.

YOUR PETITIONERS TERM AS INVOKED BY THE SENTENCING COURT EXPIRED JANUARY, 1971, AND HE IS NOW AND HAS BEEN UNCONSTITUTIONALLY REQUIRED TO BE TWICE PUNISHED BY THE TWICE SERVING OF HIS TERM OF CUSTODY SERVED ON PAROLE IN THE CUSTODY OF THE WARDEN, THROUGH THE DENIAL OF CREDIT OF TERM TIME ON PAROLE ALREADY SERVED IN VIOLATION OF THE FIFTH (5) AND FOURTEENTH (14) AMENDMENTS OF THE UNITED STATES CONSTITUTION.

AUTHORITIES IN SUPPORT OF GROUNDS FOR ISSUANCE OF WRIT UPON MANDATE

I.

THAT THE 5th, 8th, AND 14th AMENDMENTS OF THE UNITED STATES CONSTITUTION PROHIBITS THE DENIAL OF CREDIT OF TIME ALREADY SERVED IN THE CUSTODY OF THE WARDEN OF THE TERM IN TIME SERVED WHILE ON PAROLE UNDER THE CUSTODY OF THE WARDEN, AND ANY TERM DOUBLY SERVED, CONSTITUTES DOUBLE JEOPARDY, EVEN THOUGH IT BE A LOWER GRADE OF PUNISHMENT IN THE CUSTODY OF THE WARDEN FOR THE TERM ASSESSED BY THE COMMITTING COURT OF RECORD.

AUTHORITIES

STATE VS. HUNTER, 100 N.W. 510 at PAGE 513, RE SECTION 687.5 IOWA CODE 1966 et seq. "PAROLE RELATES TO AN ADMINISTRATIVE ACTION TAKEN AFTER THE CONVICT HAS SERVED A PORTION OF HIS SENTENCE BEHIND PRISON WALLS. IT IS NOT A SUSPENSION OF SENTENCE, BUT, A SUBSTITUTION DURING THE CONTINUANCE OF THE PAROLE, OF A LOWER GRADE OF PUNISHMENT, BY THE CONFINEMENT IN THE LEGAL CUSTODY AND UNDER THE CONTROL OF THE WARDEN WITHIN THE SPECIFIED PRISON BOUNDS OUTSIDE THE PRISON FOR THE CONFINEMENT WITHIN THE PRISON ADJUDGED BY THE COURT." *BOOHER VS. LEE AND O'BRIEN COUNTIES AND THE STATE OF IOWA, ET AL., CASE NO. 20425, DECIDED APRIL 21, 1971, 8 Cir. Ct. APPEALS.*

ASHE VS. SWENSON, 90 S.Ct.Rep. 1189 Note 1, page 1191, QUOTE "THERE CAN BE NO DOUBT OF THE "RETROACTIVITY" OF THE COURT'S DECISION IN BENTON VS. MARYLAND, 89 S.Ct.Rep. 2056 at page 2058. IN NORTH CAROLINA VS. PEARCE, 89 S.Ct.Rep. 2072 (p. 2082), 395 U.S. 711, 23 L.E. 2d 656; DECIDED THE SAME DAY AS BENTON, THE COURT UNANIMOUSLY ACCORDED FULLY RETROACTIVE EFFECT TO THE BENTON DOCTRINE."

NORTH CAROLINA VS. PEARCE, 89 S.Ct. Rep. 2072, AT PAGE 2082, QUOTE: "Op.J.BLACK, ... I AGREE WITH THE COURT THAT THE DOUBLE JEOPARDY CLAUSE PROHIBITS THE DENIAL OF CREDIT FOR TIME ALREADY SERVED."

CONCLUSION

WHEREFORE, IT IS RESPECTFULLY SUBMITTED THAT THE COURT SHOULD CONSIDER THIS ISSUE FOR REHEARING SOLELY AND ONLY FOR THE PURPOSES OF THE ISSUANCE OF MANDATE THAT THE WRIT OF HABEAS CORPUS ISSUE ON THIS ACKNOWLEDGED POINT OF CONSTITUTIONAL LAW, AND TO PREVENT THE APPELLANT PETITIONER G. DONALD BOOHER, FROM SUFFERING ANY FURTHER INVOLUNTARY

SERVITUDE IN SLAVE LABOR FOR THE STATE OF IOWA AND AT THE HANDS OF THE JUDGES OF THIS COURT OF THE UNITED STATES OF AMERICA DUTY BOUND BY OUR CONSTITUTION TO SET HIM AT LIBERTY FOR THE FOREGOING REASONS AS GROUNDS THEREFORE.

YOUR PETITIONER APPELLANT FURTHER PETIONS THIS COURT OR ANY JUDGE THEREOF TO DIRECT THAT HE BE RELEASED FROM SUCH CRUEL AND UNUSUAL PUNISHMENT OF DOUBLE JEOPARDY UPON PERSONAL RECOGNIZANCE BOND UNTIL THERE IS A FINAL JUDGMENT IN THIS CASE, FOR THE GROUNDS HEREINTOFORE SET FORTH IN PETITION FOR REHEARING AND REDRESS UNDER THE EQUAL PROTECTION OF THE LAWS CLAUSES OF AMENDMENT 14 SECTION 1, U. S. CONSTITUTION, FORTHWITH.

DONE THIS 30 DAY OF APRIL, 1971.

BY: G. DONALD BOOHER, #29509
G. DONALD BOOHER, APPELLANT PETITIONER
POB 316, IOWA STATE PENITENTIARY
FORT MADISON, IOWA,

SUBSCRIBED AND SWORN TO BEFORE ME THIS 30 DAY OF APRIL, 1971, FT. MADISON, IOWA.
NOTARY PUBLIC IN AND FOR LEE COUNTY, IOWA
MY COMMISSION EXPIRES JULY 4th, 1972.

Upon Refusal of Notary
Witnessed By:
C. S. Cummings
Robert Miller

APPROVED BY: _____

W. DON BRITTIN, JR., ATTY. AT LAW, DES MOINES, IOWA,
COUNSEL FOR APPELLANT PETITIONER.

(ORDER DENYING PETITION OF APPELLANT OF JUNE 7, 1971 and AFFIDAVIT OF APPELLANT OF JUNE 7, 1971)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 20425 September Term, 1970

G. DONALD BOOHER, *Appellant,* vs. LEE AND O'BRIEN COUNTIES, AND THE STATE OF IOWA, *et al.*, *Appellees.*	Appeal from the United States District Court for the Southern District of Iowa.

[Filed Jun 7 1971, Robert C. Tucker, *Clerk*]

Subsequent to the issuance of our mandate in this cause we have received, through counsel for appellant, pro se pleadings from the appellant entitled "Petition for Rehearing and for Issuance of Writ of Habeas Corpus upon Mandate of the Court Issued in this case En Banc on April 21, 1971" and "Affidavit of Intent." Having carefully considered the pleadings the Clerk of this Court is hereby directed to file them and, having been so filed, they are denied in all respects.

June 7, 1971

SUPREME COURT OF THE UNITED STATES

No. 71-5103

John J. Morrissey and
G. Donald Booher, *Petitioners*,

v.

Lou V. Brewer, *Warden*

On petition for writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

On consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

December 20, 1971